

**United States Bankruptcy Court
District of Massachusetts**

A GUIDE FOR THE PRO SE FILER

February 2007 (revised)

INTRODUCTION

This Court has always welcomed those who wish to assert their right to file bankruptcy without the services of an attorney, the so-called pro se filer. However, due to the complexity of the issues that may be involved in selecting which chapter to file, claiming the proper exemptions, understanding what may or may not be discharged, and the possibility of a dischargeability or discharge complaint being filed, we do recommend that individuals seek the services of competent counsel. That being said, there will be a number of individuals who still choose to “go it alone.”

This manual is prepared for that person, the individual who has decided to proceed with a bankruptcy filing without any legal assistance. While neither the Court nor any employee of the Court can give legal advice¹, there are a number of procedural steps in filing a bankruptcy petition and managing the case through discharge that can be complicated. The manual is intended to assist the pro se filer in navigating those procedural steps.

¹ Courts have adopted the policy that employees of the clerk’s office are prohibited from giving legal advice to the public. Courts use 28 U.S.C. §955 to support this position, reasoning that providing legal advice comes within the definition of the “practice” of law prohibited by §955.

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OVERVIEW OF THE BANKRUPTCY PROCESS

This section will give you a glimpse into the bankruptcy process, the steps involved in most cases, and what a debtor must do to effectively navigate a case through this court.

1. **Debtor(s) must attend an approved credit counseling course within 180 days before filing the bankruptcy petition [unless a certification attesting to exigent circumstances is filed with the petition (see 11 U.S.C. §h(3)(A))].**
2. Debtor(s) must use the official forms, including the Means Test Calculation form (Form 22), complete them accurately and file them with the Court.
3. A certificate of attendance from an approved credit counseling service must be filed with the official forms.
4. Debtor(s) must pay the filing fee in full or
 - (a) file an Application to Waive the Filing Fee, which must be approved by the Court
 - (b) file an Application to Pay the Filing Fee in Installments.
5. Debtor(s) must send the trustee a copy of their prior year's federal tax return² at least 7 days before the scheduled meeting of creditors.
6. If a creditor requests a copy of the tax return at least 15 days before the meeting of creditors, the debtor(s) must provide a copy to that creditor at least 7 days before the meeting.
7. At the meeting, debtor(s) must provide two forms of identification, such as a driver's license, a passport, a social security card or a credit card (at least one must be a picture ID).
8. At the meeting, debtor(s) must provide the trustee with copies of pay stubs and other indications of all income received within the prior six months.
9. Debtor(s) must attend the meeting of creditors and be examined under oath by the trustee. Creditors are invited to attend this meeting.
10. Debtor(s) must cooperate with the trustee and respond to all reasonable requests for information and documents.
11. Debtor(s) must complete a Financial Management course approved by the Office of the United States Trustee and file a certificate of completion with the Court. This must be done within 45 days after the meeting of creditors.

² Alternatively, debtor may provide the trustee and/or a creditor with a transcript of the applicable tax return. A transcript is available from the Internal Revenue Service by calling 800-829-1040 or by downloading the form (Form 4506T) from their website: irs.gov

Generally, debtor(s) will be granted a discharge if all the required steps have been completed and, if any complaint objecting to the discharge was filed by a creditor or the trustee, the complaint has been resolved in the debtor(s)' favor.

LOCATING LEGAL AUTHORITY/STATUTORY SOURCES

The federal bankruptcy law is found under Title 11 of the United States Code. Copies of the United States Code are available at public libraries and may be found online at <http://www.law.cornell.edu/topics/bankruptcy.html> There are also federal and local rules and forms that apply to every bankruptcy case. The federal rules and forms are available on the same website. The local rules and forms are available on the Court's website: www.mab.uscourts.gov

THE EFFECT OF REPEAT FILINGS

Automatic Stay

If you have filed a bankruptcy petition within the previous 12 months, you should be aware that the automatic stay provided under 11 U.S.C. §362(a) may not take effect in another case or may be of limited duration. The stay is operative for only 30 days if you had a prior bankruptcy case pending within the previous 12 months. The stay does not go into effect at all if you had two cases pending in the prior 12 months. Read the section of the law noted above if you have any questions or to determine whether or not this may apply to you.

Discharge

If you have filed a bankruptcy case previously and received a discharge, the law limits how often you may file again and receive another discharge of your debts. You may file a Chapter 7 case and receive a discharge of debts only once every 8 years. The time is calculated from the date of filing of each of the cases. You may file a Chapter 13 two years after a prior Chapter 13, but four years after any other chapter. If you file a case within these time frames, the law states that you will not receive a discharge.

BEFORE FILING FOR BANKRUPTCY

The initial goal of bankruptcy is to relieve an individual of unmanageable debt and, through the use of the allowed exemptions, to leave the individual with the means to support himself or herself and their family. The bankruptcy law requires that a debtor seek credit counseling prior to filing a bankruptcy petition. In other words, explore other avenues of unburdening oneself from debt before deciding bankruptcy is the best or only option. The Office of the United States Trustee has an approved list of credit counseling agencies for each state. See **Exhibit 1** for the current list for Massachusetts. This list is updated regularly; check the website for the current list. The lists for each of the other states is also available on the website.

An individual must attend credit counseling either in person, over the telephone, or via the internet. If that counseling is not successful and the individual still needs to file bankruptcy, then he or she must obtain a certificate from the counseling agency attesting to the fact that they attended counseling. If a repayment plan was developed for the individual, then that plan as well as the certificate must be filed with the bankruptcy petition. If an individual must file a petition quickly and he or she has not been to credit counseling, the petition can be filed but the person must file a statement of exigent circumstances and then must attend counseling within 30 days of filing the petition. See 11 U.S.C. §109(h)(3)(A). Failure to file the statement and attend the counseling within 30 days of the bankruptcy filing will result in dismissal of the case.

You may work with a bankruptcy petition preparer who will assist you with the paperwork, however, a preparer is not an attorney and is prohibited from giving legal advice. Furthermore, a petition preparer must comply with Title 11 U.S.C. §110, provide his/her tax identification number, and disclose any compensation you paid for the services. A preparer will generally have the forms available for you and assist you in completing the routine information; but remember, he or she is not an attorney and cannot and should not be advising you on what chapter to file, what exemptions to claim, how secured debt may be affected, and generally how your case will be resolved.

If you do plan to file a bankruptcy petition without anyone's assistance, the first step in the process is to secure the proper forms. The official forms, authorized by the Judicial Conference of the United States, are available from any legal stationery store, or you can download them for free at www.mab.uscourts.gov. The first problem you encounter will be to determine which type of bankruptcy is best for you: Chapter 7, 11, or 13. See **Exhibits 2, 3 and 4** for some information on the various chapters of bankruptcy. Basically, in a Chapter 7 you turn your nonexempt assets over to a trustee who then liquidates, or sells them, to pay your creditors. In a Chapter 13, you devise a plan in which you pay creditors back a percentage of what you owe them over a period of up to five years. Note that this Court's Local Rules has a special section devoted to Chapter 13 cases. A chapter 11 generally is filed by individuals who have debts that exceed the amounts allowed under a Chapter 13 [see 11 U.S.C. §109(e)]. Similar to a 13, in a Chapter 11 the debtor devises a plan to pay creditors back over a period of time. Chapter 11 is intended primarily for business debtors, so individuals may find the reporting and accounting requirements and the potential for the creation of a creditors committee to be unduly burdensome and expensive.

PREPARING THE PAPERWORK

Once you have decided on which chapter to file, you must complete the forms. Gather all your paperwork together, past and present bills, collection notices, etc., as well as your pay stubs and the prior year's tax return. The first four pages, referred to as the "petition pages," are self-explanatory: name(s), address(es), telephone number(s), social security number(s), chapter you wish to file, number of creditors, estimated assets and estimated debt, and the like. You must answer all the questions that apply to you. At the end of the fourth page there is a signature line.

You must sign the petition here. If this is a joint petition, a husband and a wife, then both parties must sign. An individual and a corporation cannot file a joint petition, however, if you own an unincorporated business then you may include that business name and the debts it owes in your petition. For example, John Doe runs a deli called The Corner Deli. It is not a corporation. He could file bankruptcy as John Doe, d/b/a (Doing Business As) The Corner Deli, and include any debts the business owes since he is personally responsible for those debts. If the business was incorporated, it would have to file its own separate bankruptcy petition.

Individual debtors must obtain credit counseling before they file a bankruptcy petition under any chapter. **Exhibit D**, entitled "Individual Debtor's Statement of Compliance With Credit Counseling Requirement," must be completed, signed and filed with the bankruptcy petition. If a joint petition, each debtor must file a separate Exhibit D.

Once you file your bankruptcy petition, the Court will send a notice of a meeting of creditors to all the creditors you list on your Schedules D, E and F, discussed below. The Court requires that you provide a typed list of all of these creditors in a specific format so that the names and addresses can be scanned into the computer. This is called a matrix. The mailing matrix must be typed or printed on plain, white paper, in a single column, no closer than one inch from the top or bottom edge of the paper. Each creditor record must be no more than five (5) lines; each line must be 25 characters or fewer in length, and each name/address block must be separated by at least one (1) blank line. Avoid extra or stray marks anywhere on the paper; do not type page numbers, case numbers, the debtor(s)' name(s) or attorney's name - this is a mailing list of creditors only. The debtor(s)' name(s) and case number (if known) should be indicated on the upper right-hand corner of the **reverse of each page** of the matrix. The names and addresses must be single spaced, in one column from the top to the bottom of the page. Leave approximately ½ inch between each name and address. See **Exhibit 5**. The Court will send the notice to each of the creditors on your matrix - be sure to include all creditors listed in your schedules. If a creditor does not receive a notice from the Court, then the bankruptcy discharge may not affect that creditor's ability to pursue you after the bankruptcy for the debt that you owe.

The next several sections of the bankruptcy petition are what are called the schedules. There are schedules A through J. Your answer to every question must be accurate and completely honest because you are swearing under the pains and penalty of perjury that each statement you are making is truthful. Title 18 of the United States Code provides penalties, including fines and jail time, for falsifying bankruptcy schedules, concealing assets and other bankruptcy related crimes. **Schedule A** asks for a listing of your real property, that is, any interest (however small), that you own in any real estate, whether it is land, a house, a condominium or other place of abode. As with each of the schedules, if it does not apply you, check off the box at the top left that says "None." If you check "None" on Schedule A that means that you do not own any real estate of any kind any where.

Schedule B is a listing of your personal property, everything from jewelry and china to automobiles and airplanes, and everything in between. There are 32 questions regarding any possible type of personal property that a person might own. Read each question on the left side of the form carefully and answer it honestly and completely.

Schedule C is very critical. This is where you choose which set of exemptions, the state or the federal, you will choose to exempt your assets from the reach of the trustee. In some states you only have the choice of that state's exemptions laws, but in Massachusetts you still can choose the exemptions allowed under either state law or federal bankruptcy law. This is a legal decision that only you can make. Neither court personnel nor a petition preparer is permitted, qualified or trained to give you this advice. Once you have decided which exemptions you will use, follow the directions and list the real and personal property items that you are exempting and the section of the law or statute that permits that exemption. The federal bankruptcy exemptions can be found under Title 11, United States Code, §522(d). For the state exemptions applicable to you, refer to the section on exemptions under the state law of the state that applies to you.

Schedule D is a list of creditors that have a security interest in any real or personal property that you own or have any interest in. Generally, a security interest is when a lender gives you a loan so you can purchase an item, such as a car or a house, in exchange for which you give the lender the right to take that item (the car or house) if you fail to make the agreed upon loan payments. In other words, you give a security interest in the item to the lender as collateral to insure that if you do not pay the money back as agreed, the lender can get the money by taking the item. Legally, this is what is called a security interest. Schedule D requires that you list any security interest that a creditor holds in your property. Certain creditors also would be listed here if they had a lien against any of your property, such as a creditor who went to court and got a judgment against you and then placed a lien or attachment on your real estate to "secure" payment of that judgment. This type of creditor also now has a security interest in your property.

Schedule E is a list of unsecured creditors who are entitled to priority. The section of the bankruptcy law on priorities is 11 U.S.C. §507. Generally, priority creditors in an individual case would be entities such as taxing authorities, but you should review §507 to be sure you include all that may apply in your particular case.

Schedule F is a list of unsecured creditors without any priority. In most individual cases, this is the schedule that would have the largest number of creditors. If a creditor is not secured and is not entitled to a priority, then they are an unsecured creditor and should be listed here. Common examples would be debts owed to credit card companies, utility companies, unsecured personal loans (e.g., from a bank or other lender, a relative or a friend), debts owed as a co-signor on a loan, student loans, and tort claims (people or property injured or damaged due to your alleged negligence).

Schedule G is a list of all unexpired leases and executory contracts that you are a party to, either as the lessor or the lessee. For an individual the most common type of lease would involve the leasing of an automobile, but a person might also be involved in a lease for residential or commercial property. An individual involved in an unincorporated business might have many leases involving such things as copiers, computers, equipment and so on. If the business is not a corporation, then the debtor signed the leases as an individual and therefore the debtor should list those leases in this schedule. When in doubt whether to add a lessor, a lessee or any creditor to any of the schedules of debt, error on the side of caution and include their name on the appropriate schedule.

Schedule H requests that you indicate any person or entity that is a co-signor or joint obligor on any debt. You should list anyone that is responsible with you for repaying a debt. Please note the directions regarding your spouse (if any), at the beginning of the form.

Schedule I is entitled "Current Income of Individual Debtors." This form requires you to indicate the amount of income that you, and your spouse if a joint case, receive on a monthly basis from all sources. Read each question and answer accurately and truthfully.

Schedule J is entitled "Current Expenses of Individual Debtors." This form requires you to indicate the various expenses incurred on a monthly basis. Do not include payments for credit card debt or store credit cards since the assumption is that those debts will be discharged in the bankruptcy and no further payments will be due.

Official Form 6 is the Declaration Concerning Debtor's Schedules. You sign this form attesting under the pains of perjury that the documents you are filing with the Court are "true and correct to my best knowledge, information and belief."

Official Form B7 is the Statement of Financial Affairs. All debtors must answer questions 1-18 and if a debtor has been "in business," as defined in the form, then questions 19-25 must be answered as well. Read each question and answer accurately and truthfully.

Official Form 8 is called the Chapter 7 Individual Debtor's Statement of Intention. This form asks you to state what you plan to do with any property that is secured to a creditor (i.e., creditor has a security interest in it), or any property that is subject to a lease. Please note that there are deadlines (generally 30 days, but 45 days for purchase money security interests), within which you must fulfill your stated intentions; failure to do so ends the automatic stay as to the property involved.

Official Form 19A is filed only if you had the assistance of a bankruptcy petition preparer. It is the "Declaration and Signature of a Non-Attorney Bankruptcy Petition Preparer." The petition preparer completes the form under the pains of perjury.

Official Form 19B is the "Notice to Debtor By Non-Attorney Bankruptcy Petition Preparer." Obviously this notice only applies if a debtor has used the services of a petition preparer. The notice clearly states what a preparer is prohibited from doing. The debtor(s) must sign the notice and file it with the Court with the rest of the bankruptcy petition documents.

Form 22A is the "Statement of Current Monthly Income and Means Test Calculation" used by Chapter 7 debtors. **Form 22C**, the "Statement of Current Monthly Income and Disposable Income Calculation," is for use by anyone filing a Chapter 13 petition. Much like a tax form, these forms are complex and will require much effort to complete accurately. To complete the form you will need to know the median family income in your location and the IRS

guidelines for expenses and allowances. That information can be found on the Court's web site (www.mab.uscourts.gov) or from the Office of the United States Trustee (617-788-0400) or from their website (www.usdoj.gov/ust). An individual who files a Chapter 11 bankruptcy petition must complete **Form 22B** "Statement of Current Monthly Income." The completed form must be filed with the Court.

If your income is below the median income, (and you will know this after you complete Parts I, II and III of the Means Test Calculation form), then you are eligible to file Chapter 7, and in that case, you just sign the last page of the Means Test Calculation form. Note: Unless living separate and apart from one another, both spouses' income is to be included in the calculation even if only one of them is filing bankruptcy.

There are two check boxes at the top of first page of the Means Test Calculation form: "Presumption arises" and "Presumption does not arise." If your income does not exceed the median, then you check "Presumption does not arise." If your income exceeds the median, then you must complete the entire form before you will know which box to check. Follow the directions for each section. At the end of Parts I, III and again in Part VI, depending on the box you check within those sections, you are instructed to check one of the "presumption" boxes at the top of first page of the Means Test Calculation form.

In Chapter 13 cases the Means Test Calculation form is used to determine your disposable income and how much you can pay creditors under a 3 or 5 year plan.

If you file your petition and do not have all the required forms, schedules, the fee, or the matrix (list of creditors), the Court will issue an Order To Update which gives you a specific period of time to file the missing documents. For most items you have 15 days, but for the matrix you only have 5 days. If you do not file any document by the time indicated in the Order To Update, your case can be dismissed because you failed to comply with the court order and the requirements of the bankruptcy statute. Please note: If your case is dismissed, this may impact whether there is any automatic stay, or the length of the stay, in a subsequent bankruptcy case filed within 12 months.

WHERE TO FILE

Once all the forms are completed, you should deliver them or mail them to the bankruptcy court in either Boston or Worcester. Refer to Appendix 5 of the Local Rules to determine in which office of the bankruptcy court you should file your petition. The local rules are available on our website.

FILING FEE

Every bankruptcy petition requires a filing fee. The fee amounts are available on the Court's website. If you are unable to pay the fee there are two possible options. You may file an

Application to Pay Filing Fee in Installments or you may file a request to proceed in forma pauperis, which means without paying the fee. To proceed without paying the fee you must file an Application to Waive Filing Fee. Both application forms are available on our web site or from the Clerks Office.

To qualify for in forma pauperis you must earn less than 150% of the poverty level; this information is published annually by the U.S. Department of Health and Human Services. The poverty level amounts are available on our web site or at our intake counters. If you think that you qualify, you must complete and file the Application to Waive Filing Fee and that must be approved by a judge. If your application is denied, you then must pay the fee in full or you may request to pay the fee in four installments by filing an Application to Pay Filing Fee in Installments, referenced above. If you miss one of the installment payments, or if the fee is not paid in full, your case will be dismissed and no part of the filing fee can be returned. Pursuant to Local Rule 1006-2, you must pay at least \$40.00 as your first installment.

SOME DETAILS OF THE BANKRUPTCY PROCESS

Meeting of Creditors Pursuant to 11 U.S.C. §341(a)

Shortly after your bankruptcy is filed, the Court will send you and all creditors listed on your matrix a "Notice of Chapter ____ Bankruptcy Case, Meeting of Creditors, & Deadlines." In the space after chapter, the notice will indicate which chapter you filed, 7, 11 12, or 13. This notice alerts creditors that you have filed a bankruptcy petition and that they may be prohibited from taking certain actions against you or your property to collect a debt. It also informs them of key deadlines, such as

- (1) the time within which they have to file a Proof of Claim, if it appears that there will be assets that can be liquidated to pay creditors;
- (2) the time within which to file a complaint objecting to the discharge of their particular debt under 11 U.S.C. §523(a) or objecting to the discharge of all debts under 11 U.S.C. §727(a); and,
- (3) the time within which to object to the property you claimed as exempt property (your Schedule C).

The reverse of the notice has important information that you should read.

The notice of the meeting of creditors informs you and the creditors of a specific date, time and location for the meeting, which creditors are invited to attend. The notice also informs everyone that a trustee has been assigned to the case, and the name, address and other contact information for the trustee. It is the trustee's role to examine you at the meeting of creditors regarding your financial situation and to determine if there are any assets that you have that may not be exempt and that he or she could sell to generate cash to pay the creditors.

Tax Returns

The law requires that you provide the trustee, at least 7 days before the scheduled meeting of creditors, with a copy of your latest federal tax return. Also, if a creditor requests a copy of your tax return at least 15 days before the meeting of creditors, then you must also provide a copy of your return to that creditor. In both instances, you must delete or black out certain private information, such as the names of your children, account numbers (except for the last 4 digits), dates of birth (except the year), and you must only give the last four digits of your social security number. Failure to provide the tax return as required by law may result in dismissal of your bankruptcy case. And remember, dismissal may impact the imposition or length of the automatic stay in any subsequent case filed within 12 months.

The meeting of creditors generally lasts less than 10 minutes. You must bring two forms of identification with you to the meeting, such as a driver's license and social security card or credit card. The trustee will examine these to verify that you are who you say you are in the bankruptcy petition. The trustee will ask you to verify that you completed the petition and schedules and that they are accurate and complete. He or she will then ask certain questions about the information you provided on your petition and the assets that you have listed in the petition. If the trustee is satisfied that you have disclosed everything and if there are no assets that he or she can sell, then he or she will file a "no asset report" with the Court. This tells the Court and everyone that the trustee has examined you and has found no nonexempt assets that can be sold for the benefit of your creditors. All meetings of creditors are recorded on audio tape. The trustee will administer an oath to each debtor in which the debtor swears to answer all questions truthfully. Be aware that failing to answer any question truthfully may subject you to federal prosecution for perjury.

After the Meeting of Creditors

Once the meeting of creditors ends you may not hear from the trustee again unless he or she learns of something that raises a question that requires information from you or some further investigation. As noted above, the creditors and the trustee have a 60 day deadline to file complaints concerning your discharge. The 60 days run from the date of the meeting of creditors. They may seek an extension of that time by filing a motion with the court. Any pleading filed with the court will be sent to you so that you are aware of it and have the opportunity to respond, if you think it is necessary. Once that 60 days has passed and no extension has been granted, the Court will enter a discharge, provided all other requirements have been met (fee paid in full, meeting of creditors held and closed, trustee report filed, financial management course completed and certificate filed with Court). Basically, the discharge order relieves you of any personal liability for all dischargeable debts listed in your bankruptcy.

Financial Management Course

The bankruptcy law requires that all individual debtors attend an approved course in financial management before they can be given a discharge. The Office of the United States Trustee has approved certain courses. A list of the approved providers of these courses can be found on their website (www.usdoj.gov/ust) or on the Court's website (www.mab.uscourts.gov). See also **Exhibit 6**. Please note that this requirement is different from the credit counseling that you were required to do prior to filing your bankruptcy case. The credit counseling was a step that allowed you into bankruptcy (your ticket in, so to speak), while the financial management course is the step that gives you your ticket out of bankruptcy with a discharge.

Bankruptcy Crime

If you hide assets or property from the trustee, or fail to disclose information accurately and completely on your schedules, you may be prosecuted by the United States Attorney for a bankruptcy *crime* under Title 18 of the United States Code.

The trustee represents the interests of the creditors. You are required by law to cooperate with the trustee and to disclose all assets, wherever located and by whomever held, that you may have any interest in whatsoever. Failure to cooperate with the trustee may cause the trustee to file a complaint objecting to your discharge under 11 U.S.C. § 727(a). The bankruptcy judge would hear any complaint filed against you by any party.

The Discharge Order

Once the time to file complaints objecting to the discharge under 11 U.S.C. § 523(a) and § 727(a) has elapsed (60 days from the meeting of creditors plus any extensions of time granted by the Court), the Court will enter a discharge order that effectively relieves the debtor from personal liability for any dischargeable debts. The discharge is mailed to the debtor and to all creditors.

Remember, a discharge will only enter if you have completed all the required steps: attended the U.S. Trustee-approved credit counseling before filing; attended the meeting of creditors and any continuations of the meeting; complied with all reasonable requests from the trustee; filed all of the documents required under 11 U.S.C. § 521; completed a U.S. Trustee-approved financial management course; and lastly, any dischargeability/discharge complaints filed against you in the bankruptcy court were resolved in your favor.

What Are Dischargeable Debts?

11 U.S.C. § 523, entitled "Exceptions to discharge," and §727, entitled "Discharge," relate to debts that are not discharged in bankruptcy. A reading of §727(b) gives some indication of what are dischargeable debts:

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief³ under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title. (Emphasis supplied.)

The easiest concept to understand here is that all debts that a debtor owed prior to filing bankruptcy will be discharged, however, the phrase “Except as provided in section 523 of this title” is important. Section 523 lists nineteen types of debt that are not discharged, for example,

- taxes within a specified period of time;
- debts based on fraud or false representation;
- consumer debts owed a single creditor aggregating \$500. or more for luxury goods and services within 90 days before the filing and cash advances within 70 days before the filing;
- debts due to embezzlement or larceny;
- debts for wilful and malicious injury to a person or property;
- fines and penalties owed to a governmental unit;
- student loans;
- death or injury caused while driving a vehicle under the influence of alcohol or drugs
- restitution
- domestic support obligations and expenses incurred in the course of a divorce or separation agreement

For further information on the discharge, see **Exhibit 7**.

POSSIBLE EVENTS

Objection to Exemptions

The trustee or a creditor may object to the exemptions you claimed. You would have to respond in writing to the objection and appear at a hearing in Court to represent your position. Note that by local rule a party filing a pleading is required to serve that pleading on all interested parties and file a certificate stating that service was made, with the name and address of each party served. Service can be done by a person over the age of 18, but usually it is done by sending the pleading to the other party via first class mail.

³ The order for relief is effective at the time and date the case is filed with the Court.

Complaint Objecting to Discharge or Dischargeability of a Debt

The trustee or a creditor may file a complaint objecting to the discharge under either or both the discharge sections (11 U.S.C. §§523 and 727). You would have to respond in writing and appear in Court to represent your position. The complaint is actually a civil action and all the related discovery motions are available to the parties. A party may conduct depositions, request answers to interrogatories, request a stipulation to the facts, and the like. You would need to respond appropriately to whatever motion or request a party might file. And as noted in the paragraph above, you must file a certificate of service indicating to whom you sent your response.

Reaffirmation Agreement

11 U.S.C. §524(c) allows you and a creditor to enter into an agreement, called a reaffirmation or reaffirmation agreement. This is a legally enforceable document in which you promise to repay all or a portion of a debt that otherwise may have been discharged in your bankruptcy case. Oftentimes the agreement involves an automobile in which the creditor has a security interest. You may need the car to get to work or whatever, and unless you come to an agreement with the creditor, the creditor may exercise its rights under the security agreement and relevant bankruptcy law and repossess the car.

To be valid and enforceable, a reaffirmation agreement must be filed with the Court. While the reaffirmation must be entered into before the discharge is granted, Federal Rule of Bankruptcy Procedure 4008 provides that the signed reaffirmation can be filed with the Court within 30 days after the discharge is granted. If an individual is not represented by an attorney during the negotiating of the reaffirmation agreement, then the Court must hold a hearing to approve the agreement. The Court must find that the reaffirmation does not impose an undue hardship on the debtor or the debtor's dependents and that it is in the best interest of the debtor. The debtor can rescind the agreement prior to the discharge being granted or within 60 days after the agreement is filed with the Court, whichever is later, by giving notice to the other party to the agreement, i.e., the creditor.

Reaffirmation agreements are strictly voluntary; they are not required by bankruptcy law or any other state or federal law. You can voluntarily repay any debt instead of signing a reaffirmation agreement, but there may be valid reasons for wanting to reaffirm a particular debt. Note that if you reaffirm a debt and fail to make the payments required in the reaffirmation agreement, the creditor can take action against you to recover any property that was given as security for the loan and you may remain personally liable for any deficiency or other remaining debt. The reaffirmation form (9 pages) and a form order is included as **Exhibit 8**.

Approved Credit Counseling Agencies

Exhibit 1

Massachusetts

MA

District of Massachusetts

Allen Credit and Debt Counseling Agency

www.acdcas.com

Main Address:

195 Brooks Street East
Wessington, SD 57381
888-415-8173

Delivery Method:

Internet: www.acdcas.com
Telephone: 888-415-8173
Internet/Telephone: www.acdcas.com / 1-888-415-8173

Alliance Credit Counseling, Inc.

www.knowdeb.com

Main Address:

15720 John J. Delaney Drive
Suite 100
Charlotte, NC 28277-2747
888-594-9596

Delivery Method:

Internet/Telephone: www.knowdebt.org / 888-594-9596

Black Hills Children's Ranch, Inc.

www.pioneercredit.com

Main Address:

1644 Concourse Drive
Rapid City, SD 57703
605-348-1608

Delivery Method:

Telephone: 800-888-1596

English and Spa

Community Services Network, Inc.

Main Address:

271 Main Street
Suite 303
Stoneham, MA 02180
781-438-5981

Exhibit 1

Delivery Method:

In Person:

Community Services Network, Inc.
271 Main Suite 303
Stoneham, MA 02108
781-438-5981

Consumer Credit Counseling Service of Greater Atlanta, Inc.

www.cccsinc

Main Address:

100 Edgewood Avenue
Suite 1800
Atlanta, GA 30303
866-672-2227

Delivery Method:

Internet: www.cccsinc.org
Telephone: 866-672-2227

English and Spa
English and Spa

Consumer Credit Counseling Service of San Francisco

www.cccsf

Main Address:

595 Market Street
15th Floor
San Francisco, CA 94105
800-777-7526

Delivery Method:

Internet: www.cccssf.org
Telephone: 800-777-7526

English and Spa
English and Spa

Credit Advisors Foundation

www.yourbankruptcypartner.

Main Address:

1818 South 72nd Street
Omaha, NE 68124
800-942-9027

Delivery Method:

Internet: www.yourbankruptcypartner.com
Telephone: 800-625-7725

English and Spa

Credit Counseling Centers of America

cccamerica

Main Address:

9330 LBJ Freeway, Suite 900
Dallas, TX 75379
800-493-2222

Delivery Method:

Internet: www.cccamerica.org
Telephone: 800-493-2222

English and Spa

Cricket Debt Counseling

www.cricketdebt.

Main Address:

10121 S.E. Sunnyside Rd.
Suite 300
Clackamas, OR 97015
866-719-0400

Delivery Method:

Internet/Telephone: www.cricketdebt.com / 866-719-0400

English and Spa

Garden State Consumer Credit Counseling, Inc.

www.novadeb

Main Address:

225 Willowbrook Road
Freehold, NJ 07728
800-772-4557

Delivery Method:

Telephone: 877-892-4557

GreenPath, Inc.

www.greenpathbk

Main Address:

38505 Country Club Drive, Suite 210
Farmington Hills, MI 48331-3429
800-630-6718

Delivery Method:

Telephone: 800-630-6718

English and Spanish (Translator O

Hummingbird Credit Counseling and Education, Inc.

www.hbcc

Main Address:

3737 Glenwood Avenue
Suite 100-106
Raleigh, NC 27612-5515
800-645-4959

Delivery Method:

Internet/Telephone: www.hbcce.org / 800-645-4959

English and Spa

Institute for Financial Literacy, Inc.

www.financialli

Main Address:

449 Forest Avenue
Suite 12
Portland, ME 04101
866-662-4932

Delivery Method:

Internet: www.financiallit.org
Telephone: 866-662-4932
Internet/Telephone: www.financiallit.org / 866-662-4932

Money Management International, Inc.

www.moneymanagemen

Main Address:

9009 West Loop South, 7th Floor
Houston, TX 77096-1719
877-918-2227

Delivery Method:

Internet: www.moneymanagement.org
Telephone: 877-918-2227
In Person:

Consumer Credit Counseling Service of Southern New England
100 Cummings Center Suite 311H
Beverly , MA 01915

-
English and Spanish (Translator Only)
Consumer Credit Counseling Service of Southern New England
247 North Main Street Suite 200
Randolph , MA 02368

-
English and Spanish (Printed Materials Only)
Consumer Credit Counseling Service of Southern New England
34 Depot Street
Pittsfield , MA 01202

-
English and Spanish (Printed Materials Only)
Consumer Credit Counseling Service of Southern New England
409 Main Street Suite 105
Amherst , MA 01002

-
English and Spanish (Printed Materials Only)
Consumer Credit Counseling Service of Southern New England
40 Central Street
Lowell , MA 01852

-
English and Spanish (Printed Materials Only)
Consumer Credit Counseling Service of Southern New England
70 Elm Street
Worcester , MA 01609

-
English and Spanish (Printed Materials Only)
Consumer Credit Counseling Service of Southern New England
800 Cummings Park Suite 1075
Woburn , MA 01801

-
English and Spanish (Printed Materials Only)
Consumer Credit Counseling Service of Southern New England
888 Purchase Street
New Bedford , MA 02740

-
English and Spanish (Printed Materials Only)
Consumer Credit Counseling Service of Southern New England
8 Winter Street
Boston , MA 02108

-
English and Spanish (Printed Materials Only)

Pacific Rim Institute for Development & Education, Inc.

BKEdCert.

Main Address:

6230 Wilshire Blvd.
Suite 1763
Los Angeles, CA 90048
310-740-2777

Delivery Method:

Telephone: 310-740-2777
Internet/Telephone: www.bkedcert.com / 310-740-2777

Springboard Nonprofit Consumer Credit Management, Inc.

www.bkhelp

Main Address:

4351 Latham Street
Riverside, CA 92501
800-947-3752

Delivery Method:

Internet: www.credit.org
Telephone: 800-947-3752

English and Spa

**University of Missouri-Columbia Office for
Financial Success**

financialsuccess.missouri.edu/bankruptcy

Main Address:

61 Stanley Hall
Columbia, MO 65211
573-882-2173

Delivery Method:

Internet: www.missouri.edu/~cfewww/financial
Telephone: 573-882-2173

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Chapter 7

Liquidation Under the Bankruptcy Code

ALTERNATIVES TO CHAPTER 7

Debtors should be aware that there are several alternatives to chapter 7 relief. For example, debtors who are engaged in business, including corporations, partnerships, and sole proprietorships, may prefer to remain in business and avoid liquidation. Such debtors should consider filing a petition under chapter 11 of the Bankruptcy Code. Under chapter 11, the debtor may seek an adjustment of debts, either by reducing the debt or by extending the time for repayment, or may seek a more comprehensive reorganization. Sole proprietorships may also be eligible for relief under chapter 13 of the Bankruptcy Code.

In addition, individual debtors who have regular income may seek an adjustment of debts under chapter 13 of the Bankruptcy Code. A particular advantage of chapter 13 is that it provides individual debtors with an opportunity to save their homes from foreclosure by allowing them to "catch up" past due payments through a payment plan. Moreover, the court may dismiss a chapter 7 case filed by an individual whose debts are primarily consumer rather than business debts if the court finds that the granting of relief would be an abuse of chapter 7. 11 U.S.C. § 707(b).

If the debtor's "current monthly income"¹ is more than the state median, the Bankruptcy Code requires application of a "means test" to determine whether the chapter 7 filing is presumptively abusive. Abuse is presumed if

the debtor's aggregate current monthly income over 5 years, net of certain statutorily allowed expenses, is more than (i) \$10,000, or (ii) 25% of the debtor's nonpriority unsecured debt, as long as that amount is at least \$6,000.² The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income. Unless the debtor overcomes the presumption of abuse, the case will generally be converted to chapter 13 (with the debtor's consent) or will be dismissed. 11 U.S.C. § 707(b)(1).

Debtors should also be aware that out-of-court agreements with creditors or debt counseling services may provide an alternative to a bankruptcy filing.

BACKGROUND

A chapter 7 bankruptcy case does not involve the filing of a plan of repayment as in chapter 13. Instead, the bankruptcy trustee gathers and sells the debtor's nonexempt assets and uses the proceeds of such assets to pay holders of claims (creditors) in accordance with the provisions of the Bankruptcy Code. Part of the debtor's property may be subject to liens and mortgages that pledge the property to other creditors. In addition, the Bankruptcy Code will allow the debtor to keep certain "exempt" property; but a trustee will liquidate the debtor's remaining assets. Accordingly, potential debtors should realize that the filing of a petition under chapter 7 may result in the loss of property.

CHAPTER 7 ELIGIBILITY

To qualify for relief under chapter 7 of the Bankruptcy Code, the debtor may be an

individual, a partnership, or a corporation or other business entity. 11 U.S.C.

§§ 101(41), 109(b). Subject to the means test described above for individual debtors, relief is available under chapter 7 irrespective of the amount of the debtor's debts or whether the debtor is solvent or insolvent. An individual cannot file under chapter 7 or any other chapter, however, if during the preceding 180 days a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court, or the debtor voluntarily dismissed the previous case after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e). In addition, no individual may be a debtor under chapter 7 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

One of the primary purposes of bankruptcy is to discharge certain debts to give an honest individual debtor a "fresh start." The debtor has no liability for discharged debts. In a chapter 7 case, however, a discharge is only available to individual debtors, not to partnerships or corporations. 11 U.S.C. § 727(a)(1). Although an individual chapter 7 case usually results in a discharge of debts, the right to a discharge is not absolute, and some types of debts are not discharged.

Moreover, a bankruptcy discharge does not extinguish a lien on property.

HOW CHAPTER 7 WORKS

A chapter 7 case begins with the debtor filing a petition with the bankruptcy court serving the area where the individual lives or where the business debtor is organized or has its principal place of business or principal assets.³ In addition to the petition, the debtor must also file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a statement of financial affairs; and (4) a schedule of executory contracts and unexpired leases. Fed. R. Bankr. P. 1007(b). Debtors must also provide the assigned case trustee with a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case (including tax returns for prior years that had not been filed when the case began). 11 U.S.C. § 521. Individual debtors with primarily consumer debts have additional document filing requirements. They must file: a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. *Id.* A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). Even if filing jointly, a husband and wife are subject to all the document filing requirements of individual debtors. (The Official Forms may be purchased at legal stationery stores or downloaded from the internet at <http://www.uscourts.gov/bkforms/index.html>. They are not available from the court.)

As of October 17, 2005, the courts must charge a \$220 case filing fee, a \$39 miscellaneous administrative fee, and a \$15 trustee surcharge. Normally, the fees must be paid to the clerk of the court upon filing. With the court's permission, however, individual debtors may pay in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. The number of installments is limited to four, and the debtor must make the final installment no later than 120 days after filing the petition. Fed. R. Bankr. P. 1006. For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after filing the petition. *Id.* The debtor may also pay the \$39 administrative fee and the \$15 trustee surcharge in installments. If a joint petition is filed, only one filing fee, one administrative fee, and one trustee surcharge are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 707(a).

If the debtor's income is less than 150% of the poverty level (as defined in the Bankruptcy Code), and the debtor is unable to pay the chapter 7 fees even in installments, the court may waive the requirement that the fees be paid. 28 U.S.C. § 1930(f).

In order to complete the Official Bankruptcy Forms that make up the petition, statement of financial affairs, and schedules, the debtor must provide the following information:

1. A list of all creditors and the amount and nature of their claims;
2. The source, amount, and frequency of the debtor's income;

3. A list of all of the debtor's property; and
4. A detailed list of the debtor's monthly living expenses, *i.e.*, food, clothing, shelter, utilities, taxes, transportation, medicine, etc.

Married individuals must gather this information for their spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only one spouse is filing. In a situation where only one spouse files, the income and expenses of the non-filing spouse is required so that the court, the trustee and creditors can evaluate the household's financial position.

Among the schedules that an individual debtor will file is a schedule of "exempt" property. The Bankruptcy Code allows an individual debtor⁴ to protect some property from the claims of creditors because it is exempt under federal bankruptcy law or under the laws of the debtor's home state. 11 U.S.C. § 522(b). Many states have taken advantage of a provision in the Bankruptcy Code that permits each state to adopt its own exemption law in place of the federal exemptions. In other jurisdictions, the individual debtor has the option of choosing between a federal package of exemptions or the exemptions available under state law. Thus, whether certain property is exempt and may be kept by the debtor is often a question of state law. The debtor should consult an attorney to determine the exemptions available in the state where the debtor lives.

Filing a petition under chapter 7 "automatically stays" (stops) most collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. But filing the petition does not stay certain types of actions listed under 11 U.S.C. § 362(b), and the stay

may be effective only for a short time in some situations. The stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally may not initiate or continue lawsuits, wage garnishments, or even telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Between 20 and 40 days after the petition is filed, the case trustee (described below) will hold a meeting of creditors. If the U.S. trustee or bankruptcy administrator⁵ schedules the meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the order for relief. Fed. R. Bankr. P. 2003(a). During this meeting, the trustee puts the debtor under oath, and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding the debtor's financial affairs and property. 11 U.S.C.

§ 343. If a husband and wife have filed a joint petition, they both must attend the creditors' meeting and answer questions. Within 10 days of the creditors' meeting, the U.S. trustee will report to the court whether the case should be presumed to be an abuse under the means test described in 11 U.S.C. § 704(b).

It is important for the debtor to cooperate with the trustee and to provide any financial records or documents that the trustee requests. The Bankruptcy Code requires the trustee to ask the debtor questions at the meeting of creditors to ensure that the debtor is aware of the potential consequences of seeking a discharge in bankruptcy such as the effect on credit history, the ability to file a petition under a different chapter, the effect of

receiving a discharge, and the effect of reaffirming a debt. Some trustees provide written information on these topics at or before the meeting to ensure that the debtor is aware of this information. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending the meeting of creditors. 11 U.S.C. § 341(c).

In order to accord the debtor complete relief, the Bankruptcy Code allows the debtor to convert a chapter 7 case to case under chapter 11, 12 or 13⁶ as long as the debtor is eligible to be a debtor under the new chapter. However, a condition of the debtor's voluntary conversion is that the case has not previously been converted to chapter 7 from another chapter. 11 U.S.C. § 706(a). Thus, the debtor will not be permitted to convert the case repeatedly from one chapter to another.

ROLE OF THE CASE TRUSTEE

When a chapter 7 petition is filed, the U.S. trustee (or the bankruptcy court in Alabama and North Carolina) appoints an impartial case trustee to administer the case and liquidate the debtor's nonexempt assets. 11 U.S.C. §§ 701, 704. If all the debtor's assets are exempt or subject to valid liens, the trustee will normally file a "no asset" report with the court, and there will be no distribution to unsecured creditors. Most chapter 7 cases involving individual debtors are no asset cases. But if the case appears to be an "asset" case at the outset, unsecured creditors⁷ must file their claims with the court within 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c). A governmental unit, however, has 180 days from the date the case is filed to file a claim. 11 U.S.C. § 502(b)(9). In the typical no asset chapter 7 case, there is no need for creditors to

file proofs of claim because there will be no distribution. If the trustee later recovers assets for distribution to unsecured creditors, the Bankruptcy Court will provide notice to creditors and will allow additional time to file proofs of claim. Although a secured creditor does not need to file a proof of claim in a chapter 7 case to preserve its security interest or lien, there may be other reasons to file a claim. A creditor in a chapter 7 case who has a lien on the debtor's property should consult an attorney for advice.

Commencement of a bankruptcy case creates an "estate." The estate technically becomes the temporary legal owner of all the debtor's property. It consists of all legal or equitable interests of the debtor in property as of the commencement of the case, including property owned or held by another person if the debtor has an interest in the property. Generally speaking, the debtor's creditors are paid from nonexempt property of the estate.

The primary role of a chapter 7 trustee in an asset case is to liquidate the debtor's nonexempt assets in a manner that maximizes the return to the debtor's unsecured creditors. The trustee accomplishes this by selling the debtor's property if it is free and clear of liens (as long as the property is not exempt) or if it is worth more than any security interest or lien attached to the property and any exemption that the debtor holds in the property. The trustee may also attempt to recover money or property under the trustee's "avoiding powers." The trustee's avoiding powers include the power to: set aside preferential transfers made to creditors within 90 days before the petition; undo security interests and other prepetition transfers of property that were not properly perfected under nonbankruptcy law at the time of the petition;

and pursue nonbankruptcy claims such as fraudulent conveyance and bulk transfer remedies available under state law. In addition, if the debtor is a business, the bankruptcy court may authorize the trustee to operate the business for a limited period of time, if such operation will benefit creditors and enhance the liquidation of the estate. 11 U.S.C. § 721.

Section 726 of the Bankruptcy Code governs the distribution of the property of the estate. Under § 726, there are six classes of claims; and each class must be paid in full before the next lower class is paid anything. The debtor is only paid if all other classes of claims have been paid in full. Accordingly, the debtor is not particularly interested in the trustee's disposition of the estate assets, except with respect to the payment of those debts which for some reason are not dischargeable in the bankruptcy case. The individual debtor's primary concerns in a chapter 7 case are to retain exempt property and to receive a discharge that covers as many debts as possible.

THE CHAPTER 7 DISCHARGE

A discharge releases individual debtors from personal liability for most debts and prevents the creditors owed those debts from taking any collection actions against the debtor. Because a chapter 7 discharge is subject to many exceptions, though, debtors should consult competent legal counsel before filing to discuss the scope of the discharge. Generally, excluding cases that are dismissed or converted, individual debtors receive a discharge in more than 99 percent of chapter 7 cases. In most cases, unless a party in interest files a complaint objecting to the discharge or a motion to extend the time to

object, the bankruptcy court will issue a discharge order relatively early in the case – generally, 60 to 90 days after the date first set for the meeting of creditors. Fed. R. Bankr. P. 4004(c).

The grounds for denying an individual debtor a discharge in a chapter 7 case are narrow and are construed against the moving party. Among other reasons, the court may deny the debtor a discharge if it finds that the debtor: failed to keep or produce adequate books or financial records; failed to explain satisfactorily any loss of assets; committed a bankruptcy crime such as perjury; failed to obey a lawful order of the bankruptcy court; fraudulently transferred, concealed, or destroyed property that would have become property of the estate; or failed to complete an approved instructional course concerning financial management. 11 U.S.C. § 727; Fed. R. Bankr. P. 4005.

Secured creditors may retain some rights to seize property securing an underlying debt even after a discharge is granted. Depending on individual circumstances, if a debtor wishes to keep certain secured property (such as an automobile), he or she may decide to “reaffirm” the debt. A reaffirmation is an agreement between the debtor and the creditor that the debtor will remain liable and will pay all or a portion of the money owed, even though the debt would otherwise be discharged in the bankruptcy. In return, the creditor promises that it will not repossess or take back the automobile or other property so long as the debtor continues to pay the debt.

If the debtor decides to reaffirm a debt, he or she must do so before the discharge is entered. The debtor must sign a written reaffirmation agreement and file it with the court. 11 U.S.C.

§ 524(c). The Bankruptcy Code requires that reaffirmation agreements contain an extensive set of disclosures described in 11 U.S.C. § 524(k). Among other things, the disclosures must advise the debtor of the amount of the debt being reaffirmed and how it is calculated and that reaffirmation means that the debtor’s personal liability for that debt will not be discharged in the bankruptcy. The disclosures also require the debtor to sign and file a statement of his or her current income and expenses which shows that the balance of income paying expenses is sufficient to pay the reaffirmed debt. If the balance is not enough to pay the debt to be reaffirmed, there is a presumption of undue hardship, and the court may decide not to approve the reaffirmation agreement. Unless the debtor is represented by an attorney, the bankruptcy judge must approve the reaffirmation agreement.

If the debtor was represented by an attorney in connection with the reaffirmation agreement, the attorney must certify in writing that he or she advised the debtor of the legal effect and consequences of the agreement, including a default under the agreement. The attorney must also certify that the debtor was fully informed and voluntarily made the agreement and that reaffirmation of the debt will not create an undue hardship for the debtor or the debtor’s dependants. 11 U.S.C. § 524(k). The Bankruptcy Code requires a reaffirmation hearing if the debtor has not been represented by an attorney during the negotiating of the agreement, or if the court disapproves the reaffirmation agreement. 11 U.S.C. § 524(d) and (m). The debtor may repay any debt voluntarily, however, whether or not a reaffirmation agreement exists. 11 U.S.C. § 524(f).

An individual receives a discharge for most of his or her debts in a chapter 7 bankruptcy case. A creditor may no longer initiate or continue any legal or other action against the debtor to collect a discharged debt. But not all of an individual's debts are discharged in chapter 7. Debts not discharged include debts for alimony and child support, certain taxes, debts for certain educational benefit overpayments or loans made or guaranteed by a governmental unit, debts for willful and malicious injury by the debtor to another entity or to the property of another entity, debts for death or personal injury caused by the debtor's operation of a motor vehicle while the debtor was intoxicated from alcohol or other substances, and debts for certain criminal restitution orders. 11 U.S.C. § 523(a). The debtor will continue to be liable for these types of debts to the extent that they are not paid in the chapter 7 case. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, and debts for willful and malicious injury by the debtor to another entity or to the property of another entity will be discharged unless a creditor timely files and prevails in an action to have such debts declared nondischargeable. 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c).

The court may revoke a chapter 7 discharge on the request of the trustee, a creditor, or the U.S. trustee if the discharge was obtained through fraud by the debtor, if the debtor acquired property that is property of the estate and knowingly and fraudulently failed to report the acquisition of such property or to surrender the property to the trustee, or if the debtor (without a satisfactory explanation) makes a material misstatement or fails to provide documents or other information in

connection with an audit of the debtor's case. 11 U.S.C. § 727(d).

NOTES

1. The "current monthly income" received by the debtor is a defined term in the Bankruptcy Code and means the average monthly income received over the six calendar months before commencement of the bankruptcy case, including regular contributions to household expenses from nondebtors and including income from the debtor's spouse if the petition is a joint petition, but not including social security income or certain payments made because the debtor is the victim of certain crimes. 11 U.S.C. § 101(10A).
2. To determine whether a presumption of abuse arises, all individual debtors with primarily consumer debts who file a chapter 7 case must complete Official Bankruptcy Form B22A, entitled "Statement of Current Monthly Income and Means Test Calculation - For Use in Chapter 7." (The Official Forms may be purchased at legal stationery stores or downloaded from the internet at <http://www.uscourts.gov/bkforms/index.html>. They are not available from the court.)
3. An involuntary chapter 7 case may be commenced under certain circumstances by a petition filed by creditors holding claims against the debtor. 11 U.S.C. § 303.
4. Each debtor in a joint case (both husband and wife) can claim exemptions under the federal bankruptcy laws. 11 U.S.C. § 522(m).
5. In North Carolina and Alabama, bankruptcy administrators perform similar functions that U.S. trustees perform in the remaining 48 states. These duties include

establishing a panel of private trustees to serve as trustees in chapter 7 cases and supervising the administration of cases and trustees in cases under chapters 7, 11, 12, and 13 of the Bankruptcy Code. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the U.S. trustee program is administered by the Department of Justice. For purposes of this publication, references to U.S. trustees are also applicable to bankruptcy administrators.

6. A fee is charged for converting, on request of the debtor, a case under chapter 7 to a case under chapter 11. The fee charged is the difference between the filing fee for a chapter 7 and the filing fee for a chapter 11. 28 U.S.C. § 1930(a). Currently, the difference is \$780. *Id.* There is no fee for converting from chapter 7 to chapter 13.

7. Unsecured debts generally may be defined as those for which the extension of credit was based purely upon an evaluation by the creditor of the debtor's ability to pay, as opposed to secured debts, for which the extension of credit was based upon the creditor's right to seize collateral on default, in addition to the debtor's ability to pay.

Chapter 11

Reorganization Under the Bankruptcy Code

BACKGROUND

A case filed under chapter 11 of the United States Bankruptcy Code is frequently referred to as a "reorganization" bankruptcy.

An individual cannot file under chapter 11 or any other chapter if, during the preceding 180 days, a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court, or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d)-(e). In addition, no individual may be a debtor under chapter 11 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

HOW CHAPTER 11 WORKS

A chapter 11 case begins with the filing of a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. A petition may be a voluntary petition, which is filed by the debtor, or it may be an involuntary petition, which is filed by creditors that meet certain requirements. 11 U.S.C. §§ 301, 303. A voluntary petition must adhere to the format of Form 1 of the Official Forms prescribed by the Judicial Conference of the United States. Unless the court orders otherwise, the debtor also must file with the

court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement of financial affairs. Fed. R. Bankr. P. 1007(b). If the debtor is an individual (or husband and wife), there are additional document filing requirements. Such debtors must file: a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. 11 U.S.C. § 521. A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (The Official Forms are not available from the court, but may be purchased at legal stationery stores or downloaded from the internet at

<http://www.uscourts.gov/bkforms/index.html>.)

As of October 17, 2005, the courts are required to charge an \$1,000 case filing fee and a \$39 miscellaneous administrative fee. The fees must be paid to the clerk of the court upon filing or may, with the court's permission, be paid by individual debtors in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. Fed. R. Bankr. P. 1006(b) limits to four the number of installments for the filing fee. The final installment must be paid not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after the filing of the petition. Fed. R. Bankr. P. 1006(b). The \$39 administrative fee may be paid in installments in the same manner as the filing fee. If a joint petition is filed, only one filing

fee and one administrative fee are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 1112(b)(10).

The voluntary petition will include standard information concerning the debtor's name(s), social security number or tax identification number, residence, location of principal assets (if a business), the debtor's plan or intention to file a plan, and a request for relief under the appropriate chapter of the Bankruptcy Code. Upon filing a voluntary petition for relief under chapter 11 or, in an involuntary case, the entry of an order for relief, the debtor automatically assumes an additional identity as the "debtor in possession." 11 U.S.C.

§ 1101. The term refers to a debtor that keeps possession and control of its assets while undergoing a reorganization under chapter 11, without the appointment of a case trustee. A debtor will remain a debtor in possession until the debtor's plan of reorganization is confirmed, the debtor's case is dismissed or converted to chapter 7, or a chapter 11 trustee is appointed. The appointment or election of a trustee occurs only in a small number of cases. Generally, the debtor, as "debtor in possession," operates the business and performs many of the functions that a trustee performs in cases under other chapters. 11 U.S.C. § 1107(a).

Generally, a written disclosure statement and a plan of reorganization must be filed with the court. 11 U.S.C. §§ 1121, 1125. The disclosure statement is a document that must contain information concerning the assets, liabilities, and business affairs of the debtor sufficient to enable a creditor to make an informed judgment about the debtor's plan of reorganization. 11 U.S.C. § 1125. The information required is governed by judicial discretion and the circumstances of the case.

In a "small business case" (discussed below) the debtor may not need to file a separate disclosure statement if the court determines that adequate information is contained in the plan. 11 U.S.C. § 1125(f). The contents of the plan must include a classification of claims and must specify how each class of claims will be treated under the plan. 11 U.S.C.

§ 1123. Creditors whose claims are "impaired," *i.e.*, those whose contractual rights are to be modified or who will be paid less than the full value of their claims under the plan, vote on the plan by ballot. 11 U.S.C. § 1126. After the disclosure statement is approved by the court and the ballots are collected and tallied, the court will conduct a confirmation hearing to determine whether to confirm the plan. 11 U.S.C. § 1128.

In the case of individuals, chapter 11 bears some similarities to chapter 13. For example, property of the estate for an individual debtor includes the debtor's earnings and property acquired by the debtor after filing until the case is closed, dismissed or converted; funding of the plan may be from the debtor's future earnings; and the plan cannot be confirmed over a creditor's objection without committing all of the debtor's disposable income over five years unless the plan pays the claim in full, with interest, over a shorter period of time. 11 U.S.C. §§ 1115, 1123(a)(8), 1129(a)(15).

THE CHAPTER 11 DEBTOR IN POSSESSION

Chapter 11 is typically used to reorganize a business, which may be a corporation, sole proprietorship, or partnership. A corporation exists separate and apart from its owners, the stockholders. The chapter 11 bankruptcy case of a corporation (corporation as debtor) does not put the personal assets of the stockholders

at risk other than the value of their investment in the company's stock. A sole proprietorship (owner as debtor), on the other hand, does not have an identity separate and distinct from its owner(s). Accordingly, a bankruptcy case involving a sole proprietorship includes both the business and personal assets of the owners-debtors. Like a corporation, a partnership exists separate and apart from its partners. In a partnership bankruptcy case (partnership as debtor), however, the partners' personal assets may, in some cases, be used to pay creditors in the bankruptcy case or the partners, themselves, may be forced to file for bankruptcy protection.

Section 1107 of the Bankruptcy Code places the debtor in possession in the position of a fiduciary, with the rights and powers of a chapter 11 trustee, and it requires the debtor to perform of all but the investigative functions and duties of a trustee. These duties, set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, include accounting for property, examining and objecting to claims, and filing informational reports as required by the court and the U.S. trustee or bankruptcy administrator (discussed below), such as monthly operating reports. 11 U.S.C. §§ 1106, 1107; Fed. R. Bankr. P. 2015(a). The debtor in possession also has many of the other powers and duties of a trustee, including the right, with the court's approval, to employ attorneys, accountants, appraisers, auctioneers, or other professional persons to assist the debtor during its bankruptcy case. Other responsibilities include filing tax returns and reports which are either necessary or ordered by the court after confirmation, such as a final accounting. The U.S. trustee is responsible for monitoring the compliance of the debtor in possession with the reporting requirements.

Railroad reorganizations have specific requirements under subsection IV of chapter 11, which will not be addressed here. In addition, stock and commodity brokers are prohibited from filing under chapter 11 and are restricted to chapter 7. 11 U.S.C. § 109(d).

THE U.S. TRUSTEE OR BANKRUPTCY ADMINISTRATOR

The U.S. trustee plays a major role in monitoring the progress of a chapter 11 case and supervising its administration. The U.S. trustee is responsible for monitoring the debtor in possession's operation of the business and the submission of operating reports and fees. Additionally, the U.S. trustee monitors applications for compensation and reimbursement by professionals, plans and disclosure statements filed with the court, and creditors' committees. The U.S. trustee conducts a meeting of the creditors, often referred to as the "section 341 meeting," in a chapter 11 case. 11 U.S.C. § 341. The U.S. trustee and creditors may question the debtor under oath at the section 341 meeting concerning the debtor's acts, conduct, property, and the administration of the case.

The U.S. trustee also imposes certain requirements on the debtor in possession concerning matters such as reporting its monthly income and operating expenses, establishing new bank accounts, and paying current employee withholding and other taxes. By law, the debtor in possession must pay a quarterly fee to the U.S. trustee for each quarter of a year until the case is converted or dismissed. 28 U.S.C. § 1930(a)(6). The amount of the fee, which may range from \$250 to \$10,000, depends on the amount of the debtor's disbursements during each quarter. Should a debtor in possession fail to comply with the reporting requirements of the

U.S. trustee or orders of the bankruptcy court, or fail to take the appropriate steps to bring the case to confirmation, the U.S. trustee may file a motion with the court to have the debtor's chapter 11 case converted to another chapter of the Bankruptcy Code or to have the case dismissed.

In North Carolina and Alabama, bankruptcy administrators perform similar functions that U.S. trustees perform in the remaining forty-eight states. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the U.S. trustee program is administered by the Department of Justice. For purposes of this publication, references to U.S. trustees are also applicable to bankruptcy administrators.

CREDITORS' COMMITTEES

Creditors' committees can play a major role in chapter 11 cases. The committee is appointed by the U.S. trustee and ordinarily consists of unsecured creditors who hold the seven largest unsecured claims against the debtor. 11 U.S.C. § 1102. Among other things, the committee: consults with the debtor in possession on administration of the case; investigates the debtor's conduct and operation of the business; and participates in formulating a plan. 11 U.S.C. § 1103. A creditors' committee may, with the court's approval, hire an attorney or other professionals to assist in the performance of the committee's duties. A creditors' committee can be an important safeguard to the proper management of the business by the debtor in possession.

THE SMALL BUSINESS CASE AND THE SMALL BUSINESS DEBTOR

In some smaller cases the U.S. trustee may be unable to find creditors willing to serve on a creditors' committee, or the committee may not be actively involved in the case. The Bankruptcy Code addresses this issue by treating a "small business case" somewhat differently than a regular bankruptcy case. A small business case is defined as a case with a "small business debtor." 11 U.S.C.

§ 101(51C). Determination of whether a debtor is a "small business debtor" requires application of a two-part test. First, the debtor must be engaged in commercial or business activities (other than primarily owning or operating real property) with total non-contingent liquidated secured and unsecured debts of \$2,000,000 or less. Second, the debtor's case must be one in which the U.S. trustee has not appointed a creditors' committee, or the court has determined the creditors' committee is insufficiently active and representative to provide oversight of the debtor. 11 U.S.C. § 101(51D).

In a small business case, the debtor in possession must, among other things, attach the most recently prepared balance sheet, statement of operations, cash-flow statement and most recently filed tax return to the petition or provide a statement under oath explaining the absence of such documents and must attend court and the U.S. trustee meeting through senior management personnel and counsel. The small business debtor must make ongoing filings with the court concerning its profitability and projected cash receipts and disbursements, and must report whether it is in compliance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure and whether it has paid its taxes and filed its tax returns. 11 U.S.C. §§ 308, 1116.

In contrast to other chapter 11 debtors, the small business debtor is subject to additional

oversight by the U.S. trustee. Early in the case, the small business debtor must attend an "initial interview" with the U.S. trustee at which time the U.S. trustee will evaluate the debtor's viability, inquire about the debtor's business plan, and explain certain debtor obligations including the debtor's responsibility to file various reports. 28 U.S.C. § 586(a)(7). The U.S. trustee will also monitor the activities of the small business debtor during the case to identify as promptly as possible whether the debtor will be unable to confirm a plan.

Because certain filing deadlines are different and extensions are more difficult to obtain, a case designated as a small business case normally proceeds more quickly than other chapter 11 cases. For example, only the debtor may file a plan during the first 180 days of a small business case. 11 U.S.C. § 1121(e). This "exclusivity period" may be extended by the court, but only to 300 days, and only if the debtor demonstrates by a preponderance of the evidence that the court will confirm a plan within a reasonable period of time. When the case is not a small business case, however, the court may extend the exclusivity period "for cause" up to 18 months.

THE SINGLE ASSET REAL ESTATE DEBTOR

Single asset real estate debtors are subject to special provisions of the Bankruptcy Code. The term "single asset real estate" is defined as "a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental." 11 U.S.C.

§ 101(51B). The Bankruptcy Code provides circumstances under which creditors of a single asset real estate debtor may obtain relief from the automatic stay which are not available to creditors in ordinary bankruptcy cases. 11 U.S.C. § 362(d). On request of a creditor with a claim secured by the single asset real estate and after notice and a hearing, the court will grant relief from the automatic stay to the creditor unless the debtor files a feasible plan of reorganization or begins making interest payments to the creditor within 90 days from the date of the filing of the case, or within 30 days of the court's determination that the case is a single asset real estate case. The interest payments must be equal to the non-default contract interest rate on the value of the creditor's interest in the real estate. 11 U.S.C. § 362(d)(3).

APPOINTMENT OR ELECTION OF A CASE TRUSTEE

Although the appointment of a case trustee is a rarity in a chapter 11 case, a party in interest or the U.S. trustee can request the appointment of a case trustee or examiner at any time prior to confirmation in a chapter 11 case. The court, on motion by a party in interest or the U.S. trustee and after notice and hearing, shall order the appointment of a case trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement, or if such an appointment is in the interest of creditors, any equity security holders, and other interests of the estate. 11 U.S.C.

§ 1104(a). Moreover, the U.S. trustee is required to move for appointment of a trustee if there are reasonable grounds to believe that any of the parties in control of the debtor "participated in actual fraud, dishonesty or criminal conduct in the management of the debtor or the debtor's financial reporting." 11 U.S.C. § 1104(e). The trustee is appointed by

the U.S. trustee, after consultation with parties in interest and subject to the court's approval. Fed. R. Bankr. P. 2007.1. Alternatively, a trustee in a case may be elected if a party in interest requests the election of a trustee within 30 days after the court orders the appointment of a trustee. In that instance, the U.S. trustee convenes a meeting of creditors for the purpose of electing a person to serve as trustee in the case. 11 U.S.C. § 1104(b).

The case trustee is responsible for management of the property of the estate, operation of the debtor's business, and, if appropriate, the filing of a plan of reorganization. Section 1106 of the Bankruptcy Code requires the trustee to file a plan "as soon as practicable" or, alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed. 11 U.S.C. § 1106(a)(5).

Upon the request of a party in interest or the U.S. trustee, the court may terminate the trustee's appointment and restore the debtor in possession to management of bankruptcy estate at any time before confirmation. 11 U.S.C. § 1105.

THE ROLE OF AN EXAMINER

The appointment of an examiner in a chapter 11 case is rare. The role of an examiner is generally more limited than that of a trustee. The examiner is authorized to perform the investigatory functions of the trustee and is required to file a statement of any investigation conducted. If ordered to do so by the court, however, an examiner may carry out any other duties of a trustee that the court orders the debtor in possession not to perform. 11 U.S.C. § 1106. Each court has the authority to determine the duties of an

examiner in each particular case. In some cases, the examiner may file a plan of reorganization, negotiate or help the parties negotiate, or review the debtor's schedules to determine whether some of the claims are improperly categorized. Sometimes, the examiner may be directed to determine if objections to any proofs of claim should be filed or whether causes of action have sufficient merit so that further legal action should be taken. The examiner may not subsequently serve as a trustee in the case. 11 U.S.C. § 321.

THE AUTOMATIC STAY

The automatic stay provides a period of time in which all judgments, collection activities, foreclosures, and repossessions of property are suspended and may not be pursued by the creditors on any debt or claim that arose before the filing of the bankruptcy petition. As with cases under other chapters of the Bankruptcy Code, a stay of creditor actions against the chapter 11 debtor automatically goes into effect when the bankruptcy petition is filed. 11 U.S.C. § 362(a). The filing of a petition, however, does not operate as a stay for certain types of actions listed under 11 U.S.C. § 362(b). The stay provides a breathing spell for the debtor, during which negotiations can take place to try to resolve the difficulties in the debtor's financial situation.

Under specific circumstances, the secured creditor can obtain an order from the court granting relief from the automatic stay. For example, when the debtor has no equity in the property and the property is not necessary for an effective reorganization, the secured creditor can seek an order of the court lifting the stay to permit the creditor to foreclose on

the property, sell it, and apply the proceeds to the debt. 11 U.S.C. § 362(d).

The Bankruptcy Code permits applications for fees to be made by certain professionals during the case. Thus, a trustee, a debtor's attorney, or any professional person appointed by the court may apply to the court at intervals of 120 days for interim compensation and reimbursement payments. In very large cases with extensive legal work, the court may permit more frequent applications. Although professional fees may be paid if authorized by the court, the debtor cannot make payments to professional creditors on prepetition obligations, *i.e.*, obligations which arose before the filing of the bankruptcy petition. The ordinary expenses of the ongoing business, however, continue to be paid.

WHO CAN FILE A PLAN

The debtor (unless a "small business debtor") has a 120-day period during which it has an exclusive right to file a plan. 11 U.S.C.

§ 1121(b). This exclusivity period may be extended or reduced by the court. But, in no event, may the exclusivity period, including all extensions, be longer than 18 months. 11 U.S.C. § 1121(d). After the exclusivity period has expired, a creditor or the case trustee may file a competing plan. The U.S. trustee may not file a plan. 11 U.S.C. § 307.

A chapter 11 case may continue for many years unless the court, the U.S. trustee, the committee, or another party in interest acts to ensure the case's timely resolution. The creditors' right to file a competing plan provides incentive for the debtor to file a plan within the exclusivity period and acts as a check on excessive delay in the case.

AVOIDABLE TRANSFERS

The debtor in possession or the trustee, as the case may be, has what are called "avoiding" powers. These powers may be used to undo a transfer of money or property made during a certain period of time before the filing of the bankruptcy petition. By avoiding a particular transfer of property, the debtor in possession can cancel the transaction and force the return or "disgorgement" of the payments or property, which then are available to pay all creditors. Generally, and subject to various defenses, the power to avoid transfers is effective against transfers made by the debtor within 90 days before filing the petition. But transfers to "insiders" (*i.e.*, relatives, general partners, and directors or officers of the debtor) made up to a year before filing may be avoided. 11 U.S.C. §§ 101(31), 101(54), 547, 548. In addition, under 11 U.S.C. § 544, the trustee is authorized to avoid transfers under applicable state law, which often provides for longer time periods. Avoiding powers prevent unfair prepetition payments to one creditor at the expense of all other creditors.

CASH COLLATERAL, ADEQUATE PROTECTION, AND OPERATING CAPITAL

Although the preparation, confirmation, and implementation of a plan of reorganization is at the heart of a chapter 11 case, other issues may arise that must be addressed by the debtor in possession. The debtor in possession may use, sell, or lease property of the estate in the ordinary course of its business, without prior approval, unless the court orders otherwise. 11 U.S.C. § 363(c). If the intended sale or use is outside the ordinary course of its business, the debtor must obtain permission from the court.

A debtor in possession may not use "cash collateral" without the consent of the secured party or authorization by the court, which must first examine whether the interest of the secured party is adequately protected. 11 U.S.C. § 363. Section 363 defines "cash collateral" as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, whenever acquired, in which the estate and an entity other than the estate have an interest. It includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a creditor's security interest.

When "cash collateral" is used (spent), the secured creditors are entitled to receive additional protection under section 363 of the Bankruptcy Code. The debtor in possession must file a motion requesting an order from the court authorizing the use of the cash collateral. Pending consent of the secured creditor or court authorization for the debtor in possession's use of cash collateral, the debtor in possession must segregate and account for all cash collateral in its possession. 11 U.S.C. § 363(c)(4). A party with an interest in property being used by the debtor may request that the court prohibit or condition this use to the extent necessary to provide "adequate protection" to the creditor.

Adequate protection may be required to protect the value of the creditor's interest in the property being used by the debtor in possession. This is especially important when there is a decrease in value of the property. The debtor may make periodic or lump sum cash payments, or provide an additional or replacement lien that will result in the

creditor's property interest being adequately protected. 11 U.S.C. § 361.

When a chapter 11 debtor needs operating capital, it may be able to obtain it from a lender by giving the lender a court-approved "superpriority" over other unsecured creditors or a lien on property of the estate. 11 U.S.C. § 364.

MOTIONS

Before confirmation of a plan, several activities may take place in a chapter 11 case. Continued operation of the debtor's business may lead to the filing of a number of contested motions. The most common are those seeking relief from the automatic stay, the use of cash collateral, or to obtain credit. There may also be litigation over executory (*i.e.*, unfulfilled) contracts and unexpired leases and the assumption or rejection of those executory contracts and unexpired leases by the debtor in possession. 11 U.S.C. § 365. Delays in formulating, filing, and obtaining confirmation of a plan often prompt creditors to file motions for relief from stay, to convert the case to chapter 7, or to dismiss the case altogether.

ADVERSARY PROCEEDINGS

Frequently, the debtor in possession will institute a lawsuit, known as an adversary proceeding, to recover money or property for the estate. Adversary proceedings may take the form of lien avoidance actions, actions to avoid preferences, actions to avoid fraudulent transfers, or actions to avoid post-petition transfers. These proceedings are governed by Part VII of the Federal Rules of Bankruptcy Procedure. At times, a creditors' committee may be authorized by the bankruptcy court to pursue these actions against insiders of the

debtor if the plan provides for the committee to do so or if the debtor has refused a demand to do so. Creditors may also initiate adversary proceedings by filing complaints to determine the validity or priority of a lien, revoke an order confirming a plan, determine the dischargeability of a debt, obtain an injunction, or subordinate a claim of another creditor.

CLAIMS

The Bankruptcy Code defines a claim as: (1) a right to payment; (2) or a right to an equitable remedy for a failure of performance if the breach gives rise to a right to payment. 11 U.S.C. § 101(5). Generally, any creditor whose claim is not scheduled (*i.e.*, listed by the debtor on the debtor's schedules) or is scheduled as disputed, contingent, or unliquidated must file a proof of claim (and attach evidence documenting the claim) in order to be treated as a creditor for purposes of voting on the plan and distribution under it. Fed. R. Bankr. P. 3003(c)(2). But filing a proof of claim is not necessary if the creditor's claim is scheduled (but is not listed as disputed, contingent, or unliquidated by the debtor) because the debtor's schedules are deemed to constitute evidence of the validity and amount of those claims. 11 U.S.C. § 1111. If a scheduled creditor chooses to file a claim, a properly filed proof of claim supersedes any scheduling of that claim. Fed. R. Bankr. P. 3003(c)(4). It is the responsibility of the creditor to determine whether the claim is accurately listed on the debtor's schedules. The debtor must provide notification to those creditors whose names are added and whose claims are listed as a result of an amendment to the schedules. The notification also should advise such creditors of their right to file proofs of claim and that their failure to do so may prevent them from voting upon the

debtor's plan of reorganization or participating in any distribution under that plan. When a debtor amends the schedule of liabilities to add a creditor or change the status of any claims to disputed, contingent, or unliquidated, the debtor must provide notice of the amendment to any entity affected. Fed. R. Bankr. P. 1009(a).

EQUITY SECURITY HOLDERS

An equity security holder is a holder of an equity security of the debtor. Examples of an equity security are a share in a corporation, an interest of a limited partner in a limited partnership, or a right to purchase, sell, or subscribe to a share, security, or interest of a share in a corporation or an interest in a limited partnership. 11 U.S.C. § 101(16), (17). An equity security holder may vote on the plan of reorganization and may file a proof of interest, rather than a proof of claim. A proof of interest is deemed filed for any interest that appears in the debtor's schedules, unless it is scheduled as disputed, contingent, or unliquidated. 11 U.S.C. § 1111. An equity security holder whose interest is not scheduled or scheduled as disputed, contingent, or unliquidated must file a proof of interest in order to be treated as a creditor for purposes of voting on the plan and distribution under it. Fed. R. Bankr. P. 3003(c)(2). A properly filed proof of interest supersedes any scheduling of that interest. Fed. R. Bankr. P. 3003(c)(4). Generally, most of the provisions that apply to proofs of claim, as discussed above, are also applicable to proofs of interest.

CONVERSION OR DISMISSAL

A debtor in a case under chapter 11 has a one-time absolute right to convert the chapter 11 case to a case under chapter 7 unless: (1) the debtor is not a debtor in possession; (2) the

case originally was commenced as an involuntary case under chapter 11; or (3) the case was converted to a case under chapter 11 other than at the debtor's request. 11 U.S.C. § 1112(a). A debtor in a chapter 11 case does not have an absolute right to have the case dismissed upon request.

A party in interest may file a motion to dismiss or convert a chapter 11 case to a chapter 7 case "for cause." Generally, if cause is established after notice and hearing, the court must convert or dismiss the case (whichever is in the best interests of creditors and the estate) unless it specifically finds that the requested conversion or dismissal is not in the best interest of creditors and the estate. 11 U.S.C. § 1112(b). Alternatively, the court may decide that appointment of a chapter 11 trustee or an examiner is in the best interests of creditors and the estate. 11 U.S.C.

§ 1104(a)(3). Section 1112(b)(4) of the Bankruptcy Code sets forth numerous examples of cause that would support dismissal or conversion. For example, the moving party may establish cause by showing that there is substantial or continuing loss to the estate and the absence of a reasonable likelihood of rehabilitation; gross mismanagement of the estate; failure to maintain insurance that poses a risk to the estate or the public; or unauthorized use of cash collateral that is substantially harmful to a creditor.

Cause for dismissal or conversion also includes an unexcused failure to timely comply with reporting and filing requirements; failure to attend the meeting of creditors or attend a Fed. R. Bankr. P. 2004 examination without good cause; failure to timely provide information to the U.S. trustee; and failure to timely pay post-petition taxes or timely file post-petition returns. Additionally,

failure to file a disclosure statement or to file and confirm a plan within the time fixed by the Bankruptcy Code or order of the court; inability to effectuate a plan; denial or revocation of confirmation; inability to consummate a confirmed plan represent "cause" for dismissal under the statute. In an individual case, failure of the debtor to pay post-petition domestic support obligations constitutes "cause" for dismissal or conversion.

Section 1112(c) of the Bankruptcy Code provides an important exception to the conversion process in a chapter 11 case. Under this provision, the court is prohibited from converting a case involving a farmer or charitable institution to a liquidation case under chapter 7 unless the debtor requests the conversion.

THE DISCLOSURE STATEMENT

Generally, the debtor (or any plan proponent) must file and get court approval of a written disclosure statement before there can be a vote on the plan of reorganization. The disclosure statement must provide "adequate information" concerning the affairs of the debtor to enable the holder of a claim or interest to make an informed judgment about the plan. 11 U.S.C. § 1125. In a small business case, however, the court may determine that the plan itself contains adequate information and that a separate disclosure statement is unnecessary. 11 U.S.C. § 1125(f). After the disclosure statement is filed, the court must hold a hearing to determine whether the disclosure statement should be approved. Acceptance or rejection of a plan usually cannot be solicited until the court has first approved the written disclosure statement. 11 U.S.C. § 1125(b). An exception to this rule exists if the initial solicitation of

the party occurred before the bankruptcy filing, as would be the case in so-called "prepackaged" bankruptcy plans (*i.e.*, where the debtor negotiates a plan with significant creditor constituencies before filing for bankruptcy). Continued post-filing solicitation of such parties is not prohibited. After the court approves the disclosure statement, the debtor or proponent of a plan can begin to solicit acceptances of the plan, and creditors may also solicit rejections of the plan.

Upon approval of a disclosure statement, the plan proponent must mail the following to the U.S. trustee and all creditors and equity security holders: (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of the plan may be filed; and (4) such other information as the court may direct, including any opinion of the court approving the disclosure statement or a court-approved summary of the opinion. Fed. R. Bankr. P. 3017(d). In addition, the debtor must mail to the creditors and equity security holders entitled to vote on the plan or plans: (1) notice of the time fixed for filing objections; (2) notice of the date and time for the hearing on confirmation of the plan; and (3) a ballot for accepting or rejecting the plan and, if appropriate, a designation for the creditors to identify their preference among competing plans. *Id.* But in a small business case, the court may conditionally approve a disclosure statement subject to final approval after notice and a combined disclosure statement/plan confirmation hearing. 11 U.S.C. § 1125(f).

ACCEPTANCE OF THE PLAN OF REORGANIZATION

As noted earlier, only the debtor may file a plan of reorganization during the first 120-day period after the petition is filed (or after entry of the order for relief, if an involuntary petition was filed). The court may grant extension of this exclusive period up to 18 months after the petition date. In addition, the debtor has 180 days after the petition date or entry of the order for relief to obtain acceptances of its plan. 11 U.S.C. § 1121. The court may extend (up to 20 months) or reduce this acceptance exclusive period for cause. 11 U.S.C. § 1121(d). In practice, debtors typically seek extensions of both the plan filing and plan acceptance deadlines at the same time so that any order sought from the court allows the debtor two months to seek acceptances after filing a plan before any competing plan can be filed.

If the exclusive period expires before the debtor has filed and obtained acceptance of a plan, other parties in interest in a case, such as the creditors' committee or a creditor, may file a plan. Such a plan may compete with a plan filed by another party in interest or by the debtor. If a trustee is appointed, the trustee must file a plan, a report explaining why the trustee will not file a plan, or a recommendation for conversion or dismissal of the case. 11 U.S.C. § 1106(a)(5). A proponent of a plan is subject to the same requirements as the debtor with respect to disclosure and solicitation.

In a chapter 11 case, a liquidating plan is permissible. Such a plan often allows the debtor in possession to liquidate the business under more economically advantageous circumstances than a chapter 7 liquidation. It also permits the creditors to take a more active role in fashioning the liquidation of the assets and the distribution of the proceeds than in a chapter 7 case.

Section 1123(a) of the Bankruptcy Code lists the mandatory provisions of a chapter 11 plan, and section 1123(b) lists the discretionary provisions. Section 1123(a)(1) provides that a chapter 11 plan must designate classes of claims and interests for treatment under the reorganization. Generally, a plan will classify claim holders as secured creditors, unsecured creditors entitled to priority, general unsecured creditors, and equity security holders.

Under section 1126(c) of the Bankruptcy Code, an entire class of claims is deemed to accept a plan if the plan is accepted by creditors that hold at least two-thirds in amount and more than one-half in number of the allowed claims in the class. Under section 1129(a)(10), if there are impaired classes of claims, the court cannot confirm a plan unless it has been accepted by at least one class of non-insiders who hold impaired claims (*i.e.*, claims that are not going to be paid completely or in which some legal, equitable, or contractual right is altered). Moreover, under section 1126(f), holders of unimpaired claims are deemed to have accepted the plan.

Under section 1127(a) of the Bankruptcy Code, the plan proponent may modify the plan at any time before confirmation, but the plan as modified must meet all the requirements of chapter 11. When there is a proposed modification after balloting has been conducted, and the court finds after a hearing that the proposed modification does not adversely affect the treatment of any creditor who has not accepted the modification in writing, the modification is deemed to have been accepted by all creditors who previously accepted the plan. Fed. R. Bankr. P. 3019. If it is determined that the proposed modification does have an adverse effect on

the claims of non-consenting creditors, then another balloting must take place.

Because more than one plan may be submitted to the creditors for approval, every proposed plan and modification must be dated and identified with the name of the entity or entities submitting the plan or modification. Fed. R. Bankr. P. 3016(b). When competing plans are presented that meet the requirements for confirmation, the court must consider the preferences of the creditors and equity security holders in determining which plan to confirm.

Any party in interest may file an objection to confirmation of a plan. The Bankruptcy Code requires the court, after notice, to hold a hearing on confirmation of a plan. If no objection to confirmation has been timely filed, the Bankruptcy Code allows the court to determine whether the plan has been proposed in good faith and according to law. Fed. R. Bankr. P. 3020(b)(2). Before confirmation can be granted, the court must be satisfied that there has been compliance with all the other requirements of confirmation set forth in section 1129 of the Bankruptcy Code, even in the absence of any objections. In order to confirm the plan, the court must find, among other things, that: (1) the plan is feasible; (2) it is proposed in good faith; and (3) the plan and the proponent of the plan are in compliance with the Bankruptcy Code. In order to satisfy the feasibility requirement, the court must find that confirmation of the plan is not likely to be followed by liquidation (unless the plan is a liquidating plan) or the need for further financial reorganization.

THE DISCHARGE

Section 1141(d)(1) generally provides that confirmation of a plan discharges a debtor

from any debt that arose before the date of confirmation. After the plan is confirmed, the debtor is required to make plan payments and is bound by the provisions of the plan of reorganization. The confirmed plan creates new contractual rights, replacing or superseding pre-bankruptcy contracts.

There are, of course, exceptions to the general rule that an order confirming a plan operates as a discharge. Confirmation of a plan of reorganization discharges any type of debtor - corporation, partnership, or individual - from most types of prepetition debts. It does not, however, discharge an individual debtor from any debt made nondischargeable by section 523 of the Bankruptcy Code.¹ Moreover, except in limited circumstances, a discharge is not available to an individual debtor unless and until all payments have been made under the plan. 11 U.S.C. § 1141(d)(5). Confirmation does not discharge the debtor if the plan is a liquidation plan, as opposed to one of reorganization, unless the debtor is an individual. When the debtor is an individual, confirmation of a liquidation plan will result in a discharge (after plan payments are made) unless grounds would exist for denying the debtor a discharge if the case were proceeding under chapter 7 instead of chapter 11. 11 U.S.C. §§ 727(a), 1141(d).

POSTCONFIRMATION MODIFICATION OF THE PLAN

At any time after confirmation and before "substantial consummation" of a plan, the proponent of a plan may modify the plan if the modified plan would meet certain Bankruptcy Code requirements. 11 U.S.C. § 1127(b). This should be distinguished from preconfirmation modification of the plan. A modified postconfirmation plan does not automatically become the plan. A modified

postconfirmation plan in a chapter 11 case becomes the plan only "if circumstances warrant such modification" and the court, after notice and hearing, confirms the plan as modified. If the debtor is an individual, the plan may be modified postconfirmation upon the request of the debtor, the trustee, the U.S. trustee, or the holder of an allowed unsecured claim to make adjustments to payments due under the plan. 11 U.S.C. § 1127(e).

POSTCONFIRMATION ADMINISTRATION

Notwithstanding the entry of the confirmation order, the court has the authority to issue any other order necessary to administer the estate. Fed. R. Bankr. P. 3020(d). This authority would include the postconfirmation determination of objections to claims or adversary proceedings, which must be resolved before a plan can be fully consummated. Sections 1106(a)(7) and 1107(a) of the Bankruptcy Code require a debtor in possession or a trustee to report on the progress made in implementing a plan after confirmation. A chapter 11 trustee or debtor in possession has a number of responsibilities to perform after confirmation, including consummating the plan, reporting on the status of consummation, and applying for a final decree.

REVOCATION OF THE CONFIRMATION ORDER

Revocation of the confirmation order is an undoing or cancellation of the confirmation of a plan. A request for revocation of confirmation, if made at all, must be made by a party in interest within 180 days of confirmation. The court, after notice and hearing, may revoke a confirmation order "if and only if the [confirmation] order was procured by fraud." 11 U.S.C. § 1144.

THE FINAL DECREE

A final decree closing the case must be entered after the estate has been "fully administered." Fed. R. Bankr. P. 3022. Local bankruptcy court policies generally determine when the final decree is entered and the case closed.

NOTES

1. Debts not discharged include debts for alimony and child support, certain taxes, debts for certain educational benefit overpayments or loans made or guaranteed by a governmental unit, debts for willful and malicious injury by the debtor to another entity or to the property of another entity, debts for death or personal injury caused by the debtor's operation of a motor vehicle while the debtor was intoxicated from alcohol or other substances, and debts for certain criminal restitution orders. 11 U.S.C. § 523(a). The debtor will continue to be liable for these types of debts to the extent that they are not paid in the chapter 11 case. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, and debts for willful and malicious injury by the debtor to another entity or to the property of another entity will be discharged unless a creditor timely files and prevails in an action to have such debts declared nondischargeable. 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c).

Chapter 13

Individual Debt Adjustment

BACKGROUND

A chapter 13 bankruptcy is also called a wage earner's plan. It enables individuals with regular income to develop a plan to repay all or part of their debts. Under this chapter, debtors propose a repayment plan to make installments to creditors over three to five years. If the debtor's current monthly income is less than the applicable state median, the plan will be for three years unless the court approves a longer period "for cause."¹ If the debtor's current monthly income is greater than the applicable state median, the plan generally must be for five years. In no case may a plan provide for payments over a period longer than five years. 11 U.S.C. §1322(d). During this time the law forbids creditors from starting or continuing collection efforts.

This chapter discusses six aspects of a chapter 13 proceeding: the advantages of choosing chapter 13, the chapter 13 eligibility requirements, how a chapter 13 proceeding works, what may be included in chapter 13 repayment plan and how it is confirmed, making the plan work, and the special chapter 13 discharge.

ADVANTAGES OF CHAPTER 13

Chapter 13 offers individuals a number of advantages over liquidation under chapter 7. Perhaps most significantly, chapter 13 offers individuals an opportunity to save their homes from foreclosure. By filing under this chapter, individuals can stop foreclosure proceedings

and may cure delinquent mortgage payments over time. Nevertheless, they must still make all mortgage payments that come due during the chapter 13 plan on time. Another advantage of chapter 13 is that it allows individuals to reschedule secured debts (other than a mortgage for their primary residence) and extend them over the life of the chapter 13 plan. Doing this may lower the payments. Chapter 13 also has a special provision that protects third parties who are liable with the debtor on "consumer debts." This provision may protect co-signers. Finally, chapter 13 acts like a consolidation loan under which the individual makes the plan payments to a chapter 13 trustee who then distributes payments to creditors. Individuals will have no direct contact with creditors while under chapter 13 protection.

CHAPTER 13 ELIGIBILITY

Any individual, even if self-employed or operating an unincorporated business, is eligible for chapter 13 relief as long as the individual's unsecured debts are less than \$307,675 and secured debts are less than \$922,975. 11 U.S.C. § 109(e). These amounts are adjusted periodically to reflect changes in the consumer price index. A corporation or partnership may not be a chapter 13 debtor. *Id.*

An individual cannot file under chapter 13 or any other chapter if, during the preceding 180 days, a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e). In addition, no individual may be a debtor under chapter 13 or any chapter of the

Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

HOW CHAPTER 13 WORKS

A chapter 13 case begins by filing a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. Unless the court orders otherwise, the debtor must also file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement of financial affairs. Fed. R. Bankr. P. 1007(b). The debtor must also file a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. 11 U.S.C. § 521. The debtor must provide the chapter 13 case trustee with a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case (including tax returns for prior years that had not been filed when the case began). *Id.* A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (The

Official Forms may be purchased at legal stationery stores or downloaded from the internet at <http://www.uscourts.gov/bkforms/index.html>. They are not available from the court.)

As of October 17, 2005, the courts must charge a \$150 case filing fee and a \$39 miscellaneous administrative fee. Normally the fees must be paid to the clerk of the court upon filing. With the court's permission, however, they may be paid in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. The number of installments is limited to four, and the debtor must make the final installment no later than 120 days after filing the petition. Fed. R. Bankr. P. 1006(b). For cause shown, the court may extend the time of any installment, as long as the last installment is paid no later than 180 days after filing the petition. *Id.* The debtor may also pay the \$39 administrative fee in installments. If a joint petition is filed, only one filing fee and one administrative fee are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 1307(c)(2).

In order to complete the Official Bankruptcy Forms that make up the petition, statement of financial affairs, and schedules, the debtor must compile the following information:

1. A list of all creditors and the amounts and nature of their claims;
2. The source, amount, and frequency of the debtor's income;
3. A list of all of the debtor's property; and

4. A detailed list of the debtor's monthly living expenses, *i.e.*, food, clothing, shelter, utilities, taxes, transportation, medicine, etc. Married individuals must gather this information for their spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only one spouse is filing. In a situation where only one spouse files, the income and expenses of the non-filing spouse is required so that the court, the trustee and creditors can evaluate the household's financial position.

When an individual files a chapter 13 petition, an impartial trustee is appointed to administer the case. 11 U.S.C. § 1302. In some districts, the U.S. trustee or bankruptcy administrator² appoints a standing trustee to serve in all chapter 13 cases. 28 U.S.C. § 586(b). The chapter 13 trustee both evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors. 11 U.S.C. § 1302(b).

Filing the petition under chapter 13 "automatically stays" (stops) most collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. Filing the petition does not, however, stay certain types of actions listed under 11 U.S.C. § 362(b), and the stay may be effective only for a short time in some situations. The stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally may not initiate or continue lawsuits, wage garnishments, or even make telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Chapter 13 also contains a special automatic stay provision that protects co-debtors. Unless

the bankruptcy court authorizes otherwise, a creditor may not seek to collect a "consumer debt" from any individual who is liable along with the debtor. 11 U.S.C. § 1301(a). Consumer debts are those incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. § 101(8).

Individuals may use a chapter 13 proceeding to save their home from foreclosure. The automatic stay stops the foreclosure proceeding as soon as the individual files the chapter 13 petition. The individual may then bring the past-due payments current over a reasonable period of time. Nevertheless, the debtor may still lose the home if the mortgage company completes the foreclosure sale under state law before the debtor files the petition. 11 U.S.C. § 1322(c). The debtor may also lose the home if he or she fails to make the regular mortgage payments that come due after the chapter 13 filing.

Between 20 and 50 days after the debtor files the chapter 13 petition, the chapter 13 trustee will hold a meeting of creditors. If the U.S. trustee or bankruptcy administrator schedules the meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the debtor files. Fed. R. Bankr. P. 2003(a). During this meeting, the trustee places the debtor under oath, and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding his or her financial affairs and the proposed terms of the plan. 11 U.S.C. § 343. If a husband and wife file a joint petition, they both must attend the creditors' meeting and answer questions. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending the creditors' meeting. 11

U.S.C. § 341(c). The parties typically resolve problems with the plan either during or shortly after the creditors' meeting. Generally, the debtor can avoid problems by making sure that the petition and plan are complete and accurate, and by consulting with the trustee prior to the meeting.

In a chapter 13 case, to participate in distributions from the bankruptcy estate, unsecured creditors must file their claims with the court within 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c). A governmental unit, however, has 180 days from the date the case is filed to file a proof of claim. 11 U.S.C. § 502(b)(9).

After the meeting of creditors, the debtor, the chapter 13 trustee, and those creditors who wish to attend will come to court for a hearing on the debtor's chapter 13 repayment plan.

THE CHAPTER 13 PLAN AND CONFIRMATION HEARING

Unless the court grants an extension, the debtor must file a repayment plan with the petition or within 15 days after the petition is filed. Fed. R. Bankr. P. 3015. A plan must be submitted for court approval and must provide for payments of fixed amounts to the trustee on a regular basis, typically biweekly or monthly. The trustee then distributes the funds to creditors according to the terms of the plan, which may offer creditors less than full payment on their claims.

There are three types of claims: priority, secured, and unsecured. Priority claims are those granted special status by the bankruptcy law, such as most taxes and the costs of bankruptcy proceeding.³ Secured claims are those for which the creditor has the right to take back certain property (*i.e.*, the collateral) if

the debtor does not pay the underlying debt. In contrast to secured claims, unsecured claims are generally those for which the creditor has no special rights to collect against particular property owned by the debtor.

The plan must pay priority claims in full unless a particular priority creditor agrees to different treatment of the claim or, in the case of a domestic support obligation, unless the debtor contributes all "disposable income" - discussed below - to a five-year plan. 11 U.S.C. § 1322(a).

If the debtor wants to keep the collateral securing a particular claim, the plan must provide that the holder of the secured claim receive at least the value of the collateral. If the obligation underlying the secured claim was used to buy the collateral (*e.g.*, a car loan), and the debt was incurred within certain time frames before the bankruptcy filing, the plan must provide for full payment of the debt, not just the value of the collateral (which may be less due to depreciation). Payments to certain secured creditors (*i.e.*, the home mortgage lender), may be made over the original loan repayment schedule (which may be longer than the plan) so long as any arrearage is made up during the plan. The debtor should consult an attorney to determine the proper treatment of secured claims in the plan.

The plan need not pay unsecured claims in full as long as it provides that the debtor will pay all projected "disposable income" over an "applicable commitment period," and as long as unsecured creditors receive at least as much under the plan as they would receive if the debtor's assets were liquidated under chapter 7. 11 U.S.C. § 1325. In chapter 13, "disposable income" is income (other than child support payments received by the

debtor) less amounts reasonably necessary for the maintenance or support of the debtor or dependents and less charitable contributions up to 15% of the debtor's gross income. If the debtor operates a business, the definition of disposable income excludes those amounts which are necessary for ordinary operating expenses. 11 U.S.C. § 1325(b)(2)(A) and (B). The "applicable commitment period" depends on the debtor's current monthly income. The applicable commitment period must be three years if current monthly income is less than the state median for a family of the same size - and five years if the current monthly income is greater than a family of the same size. 11 U.S.C. § 1325(d). The plan may be less than the applicable commitment period (three or five years) only if unsecured debt is paid in full over a shorter period.

Within 30 days after filing the bankruptcy case, even if the plan has not yet been approved by the court, the debtor must start making plan payments to the trustee. 11 U.S.C. § 1326(a)(1). If any secured loan payments or lease payments come due before the debtor's plan is confirmed (typically home and automobile payments), the debtor must make adequate protection payments directly to the secured lender or lessor - deducting the amount paid from the amount that would otherwise be paid to the trustee. *Id.*

No later than 45 days after the meeting of creditors, the bankruptcy judge must hold a confirmation hearing and decide whether the plan is feasible and meets the standards for confirmation set forth in the Bankruptcy Code. 11 U.S.C. §§ 1324, 1325. Creditors will receive 25 days' notice of the hearing and may object to confirmation. Fed. R. Bankr. P. 2002(b). While a variety of objections may be made, the most frequent ones are that payments offered under the plan are less than

creditors would receive if the debtor's assets were liquidated or that the debtor's plan does not commit all of the debtor's projected disposable income for the three or five year applicable commitment period.

If the court confirms the plan, the chapter 13 trustee will distribute funds received under the plan "as soon as is practicable." 11 U.S.C. § 1326(a)(2). If the court declines to confirm the plan, the debtor may file a modified plan. 11 U.S.C. § 1323. The debtor may also convert the case to a liquidation case under chapter 7.⁴ 11 U.S.C. § 1307(a). If the court declines to confirm the plan or the modified plan and instead dismisses the case, the court may authorize the trustee to keep some funds for costs, but the trustee must return all remaining funds to the debtor (other than funds already disbursed or due to creditors). 11 U.S.C. § 1326(a)(2).

Occasionally, a change in circumstances may compromise the debtor's ability to make plan payments. For example, a creditor may object or threaten to object to a plan, or the debtor may inadvertently have failed to list all creditors. In such instances, the plan may be modified either before or after confirmation. 11 U.S.C. §§ 1323, 1329. Modification after confirmation is not limited to an initiative by the debtor, but may be at the request of the trustee or an unsecured creditor. 11 U.S.C. § 1329(a).

MAKING THE PLAN WORK

The provisions of a confirmed plan bind the debtor and each creditor. 11 U.S.C. § 1327. Once the court confirms the plan, the debtor must make the plan succeed. The debtor must make regular payments to the trustee either directly or through payroll deduction, which will require adjustment to living on a fixed

budget for a prolonged period. Furthermore, while confirmation of the plan entitles the debtor to retain property as long as payments are made, the debtor may not incur new debt without consulting the trustee, because additional debt may compromise the debtor's ability to complete the plan. 11 U.S.C. §§ 1305(c), 1322(a)(1), 1327.

A debtor may make plan payments through payroll deductions. This practice increases the likelihood that payments will be made on time and that the debtor will complete the plan. In any event, if the debtor fails to make the payments due under the confirmed plan, the court may dismiss the case or convert it to a liquidation case under chapter 7 of the Bankruptcy Code. 11 U.S.C. § 1307(c). The court may also dismiss or convert the debtor's case if the debtor fails to pay any post-filing domestic support obligations (*i.e.*, child support, alimony), or fails to make required tax filings during the case. 11 U.S.C. §§ 1307(c) and (e), 1308, 521.

THE CHAPTER 13 DISCHARGE

The bankruptcy law regarding the scope of the chapter 13 discharge is complex and has recently undergone major changes. Therefore, debtors should consult competent legal counsel prior to filing regarding the scope of the chapter 13 discharge.

A chapter 13 debtor is entitled to a discharge upon completion of all payments under the chapter 13 plan so long as the debtor: (1) certifies (if applicable) that all domestic support obligations that came due prior to making such certification have been paid; (2) has not received a discharge in a prior case filed within a certain time frame (two years for prior chapter 13 cases and four years for prior chapter 7, 11 and 12 cases); and (3) has

completed an approved course in financial management (if the U.S. trustee or bankruptcy administrator for the debtor's district has determined that such courses are available to the debtor). 11 U.S.C. § 1328. The court will not enter the discharge, however, until it determines, after notice and a hearing, that there is no reason to believe there is any pending proceeding that might give rise to a limitation on the debtor's homestead exemption. 11 U.S.C. § 1328(h).

The discharge releases the debtor from all debts provided for by the plan or disallowed (under section 502), with limited exceptions. Creditors provided for in full or in part under the chapter 13 plan may no longer initiate or continue any legal or other action against the debtor to collect the discharged obligations.

As a general rule, the discharge releases the debtor from all debts provided for by the plan or disallowed, with the exception of certain debts referenced in 11 U.S.C. § 1328. Debts not discharged in chapter 13 include certain long term obligations (such as a home mortgage), debts for alimony or child support, certain taxes, debts for most government funded or guaranteed educational loans or benefit overpayments, debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on the debtor's conviction of a crime. To the extent that they are not fully paid under the chapter 13 plan, the debtor will still be responsible for these debts after the bankruptcy case has concluded. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, and debts for restitution or damages awarded in a civil case for willful or malicious actions by the debtor that cause personal injury or death to a person

will be discharged unless a creditor timely files and prevails in an action to have such debts declared nondischargeable. 11 U.S.C. §§ 1328, 523(c); Fed. R. Bankr. P. 4007(c).

The discharge in a chapter 13 case is somewhat broader than in a chapter 7 case. Debts dischargeable in a chapter 13, but not in chapter 7, include debts for willful and malicious injury to property (as opposed to a person), debts incurred to pay nondischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings. 11 U.S.C. § 1328(a).

THE CHAPTER 13 HARDSHIP DISCHARGE

After confirmation of a plan, circumstances may arise that prevent the debtor from completing the plan. In such situations, the debtor may ask the court to grant a "hardship discharge." 11 U.S.C. § 1328(b). Generally, such a discharge is available only if: (1) the debtor's failure to complete plan payments is due to circumstances beyond the debtor's control and through no fault of the debtor; (2) creditors have received at least as much as they would have received in a chapter 7 liquidation case; and (3) modification of the plan is not possible. Injury or illness that precludes employment sufficient to fund even a modified plan may serve as the basis for a hardship discharge. The hardship discharge is more limited than the discharge described above and does not apply to any debts that are nondischargeable in a chapter 7 case. 11 U.S.C. § 523.

NOTES

1. The "current monthly income" received by the debtor is a defined term in the Bankruptcy Code and means the average monthly income

received over the six calendar months before commencement of the bankruptcy case, including regular contributions to household expenses from nondebtors and including income from the debtor's spouse if the petition is a joint petition, but not including social security income or certain payments made because the debtor is the victim of certain crimes. 11 U.S.C. § 101(10A).

2. In North Carolina and Alabama, bankruptcy administrators perform similar functions that U.S. trustees perform in the remaining forty-eight states. The bankruptcy administrator program is administered by the Administrative Office of the United States Courts, while the U.S. trustee program is administered by the Department of Justice. For purposes of this publication, references to U.S. trustees are also applicable to bankruptcy administrators.

3. Section 507 sets forth 10 categories of unsecured claims which Congress has, for public policy reasons, given priority of distribution over other unsecured claims.

4. A fee of \$15 is charged for converting a case under chapter 13 to a case under chapter 7.

MATRIX LIST OF CREDITORS

1. This form is a sample master mailing matrix creditor list required to be filed with a bankruptcy petition. This form can be printed out or submitted on a 3½" floppy disk, following the same guidelines for both. The following format must be observed:

- 1) Listing must be in a single column containing as many pages as are required to list all creditors. Page numbers or page headings must not be included in the list.
- 2) The margins at the top and bottom of the page must be at least one inch each.
- 3) The matrix shall be produced with a quality computer printer or typewriter. If a dot matrix printer is used, it should have near letter quality. Standard type size shall be used. The name and address of each creditor must not consist of more than five (5) lines. At least one blank line shall be inserted between each creditor listing.
- 4) If not filed on disk, an original of the matrix or amended matrix must be filed with the Clerk's Office; because our optical character reader will not read a faxed document, a matrix cannot be filed by fax.
- 5) If submitting matrix on a floppy disk, please save the file as an ASCII (DOS) text file, and write the debtor's name and town on the disk.

EXAMPLE:

Donut and Coffee National Bank
P.O. Box 3391
Beaumont, TX 77703

Pyramid Investing Corp.
3001 Ghost Street
Reno, NV 86068

Hammer and Anvil Mediation, Inc.
Post Office Box 99, Stop 101
10 Garrison Blvd.
Los Angeles, CA 98323

Spotted Owl Furniture
83 Timber Street, Suite 6
Lakewood, CA 98323

Approved Debtor Education Agencies

Exhibit 6

Massachusetts

MA

District of Massachusetts

A 24/7 Bankruptcy Class, Inc.

www.advantageclass.com

Main Address:

701 Waterford Way
Suite 160
Miami, FL 33126
866-412-7247

Delivery Method:

Internet: www.advantageclass.com

English and Spanish

AAA Financial Services

www.aapersonalfinance.com

Main Address:

2525 N. Los Altos Avenue, #433
Tucson, AZ 85705
520-829-0739

Delivery Method:

Internet: www.aapersonalfinance.com

A Better Financial Education, Inc.

www.SmartMoneySense.com

Main Address:

One Capitol Mall
Suite 200
Sacramento, CA 95814
877-930-9600

Delivery Method:

Internet: www.SmartMoneySense.com

Allen Credit and Debt Counseling Agency

www.acdcas.com

Main Address:

195 Brooks Street East
Wessington, SD 57381
888-415-8173

Delivery Method:

Internet: www.acdcas.com

Telephone: 888-415-8173

Exhibit 6

Alliance Credit Counseling, Inc.

www.knowdeb.com

Main Address:

15720 John J. Delaney Drive
Suite 100

Charlotte, NC 28277-2747
888-594-9596

Delivery Method:

Internet: www.knowdebt.org
Telephone: 888-594-9596

American Bureau of Credit Services, Inc.

americanbureauofcredit.

Main Address:

5773 West Sunrise Blvd.
Plantation, FL 33313
800-701-0437

Delivery Method:

Internet: www.americanbureauofcredit.com English and Spa

American Debtor Education, Inc.

www.americandebtor.

Main Address:

8 Corporate Park
Suite 230
Irvine, CA 92606
888-332-8331

Delivery Method:

Internet: www.americandebtor.com

American Debtor Educators On-Line

www.debtor-ed.

Main Address:

1385 Kelton Avenue
Suite 104
Los Angeles, CA 90024
310-477-9982

Delivery Method:

Internet: www.debtor-ed.com English and Spanish (Printed Mater
O

American Debt Solutions, Inc.

www.adshc

Main Address:

145 Avenue L
Delray Beach, FL 33483
800-246-4019

Delivery Method:

Internet: www.adshq.org
Telephone: 800-246-4019

Arbor Investments

www.arbored.

Main Address:

1850 South 72nd Street
Omaha, NE 68124
800-625-7725

Delivery Method:

Internet: www.arbored.com
Telephone: 800-625-7725

English and Spa

Associated Financial Services

www.askafs.

Main Address:

11921 85th Place N.
Maple Grove, MN 55369
888-883-2675

Delivery Method:

Internet: www.askAFS.com
Telephone: 888-883-4281

Bankruptcy Debtor Education, LLC

bankruptcydebtoreducation.

Main Address:

14252 Culver Drive, #A-720
Irvine, CA 92604-0326
866-969-2533

Delivery Method:

Internet: www.BankruptcyDebtorEducation.com

Black Hills Children's Ranch, Inc.

www.pioneercredit.

Main Address:

1644 Concourse Drive
Rapid City, SD 57703
605-348-1608

Delivery Method:

Telephone: 800-888-1596

English and Spa

Community Services Network, Inc.

Main Address:

271 Main Street
Suite 303
Stoneham, MA 02180
781-438-5981

Delivery Method:

In Person:

Community Services Network, Inc.
271 Main Suite 303
Stoneham, MA 02108
781-438-5981

Consumer Credit and Budget Counseling, Inc.

www.cc-bc.

Main Address:

299 South Shore Road, US Route 9 South
Marmora, NJ 08223
609-390-9652

Delivery Method:

Internet: www.postbankruptcy.com

Consumer Credit Counseling Service of Greater Atlanta, Inc.

www.cccsinc.org

Main Address:

100 Edgewood Avenue
Suite 1800
Atlanta, GA 30303
866-672-2227

Delivery Method:

Internet: www.cccsinc.org

English and Spai

Consumer Credit Counseling Service of San Francisco

www.cccsf.org

Main Address:

595 Market Street
15th Floor
San Francisco, CA 94105
800-777-7526

Delivery Method:

Internet: www.cccsf.org

English and Spai

Telephone: 800-777-7526

English and Spai

Consumer Credit Management, Inc.

www.ccmcanhelp.com

Main Address:

28124 Orchard Lake Road
Suite 102
Farmington Hills, MI 48334
248-591-1221

Delivery Method:

Internet: ccmcanhelp.com

Consumer Education and Training Services

www.CentsProgram.com

Main Address:

1200 Fifth Avenue
Suite 600
Seattle, WA 98101
206-267-7017

Delivery Method:

Internet: www.CentsProgram.com

Telephone: 206-267-7017

Consumer Financial Solutions

www.consumerfinancialsolutions.com

Main Address:

1090 N. Cole Road
Boise, ID 83704
208-375-8140

Delivery Method:

Internet: www.cfsidaho.com

Credit Counseling Centers of America

cccamerica.org

Main Address:

9330 LBJ Freeway, Suite 900
Dallas, TX 75379
800-493-2222

Delivery Method:

Internet: www.cccamerica.org

English and Spanish

Telephone: 800-493-2222

English and Spanish

Dalton Education, LLC

dalton-education.com

Main Address:

4335 Woodward Way
Cumming, GA 30041
877-426-2373

Delivery Method:

Internet: www.dalton-education.com

Dave Ramsey's Financial Peace University - Bankruptcy Edition

www.bankruptcy.daveramsey.com

Main Address:

The Lampo Group
1749 Mallory Lane
Brentwood, TN 37027
888-227-3223

Delivery Method:

Internet: www.bankruptcy.daveramsey.com

DBSM, Inc.

www.ragsorriches.com

Main Address:

22717 Leadwell Street
West Hills, CA 91307
866-433-7035

Delivery Method:

Telephone: 866-433-7035

Debt Education and Certification Foundation

www.debt-foundation.org

Main Address:

112 Goliad Street
Suite D
Benbrook, TX 76126
866-859-7323

Delivery Method:

Internet: www.debt-foundation.org

Economic Opportunity Agency of Washington County, Inc.

www.tabde.org

Main Address:

614 East Emma Avenue
Suite M401
Springdale, AR 72756
800-816-6442

Delivery Method:

Internet: www.tabde.org

English and Spa

Financial Health Systems LLC

www.debtorcourse.com

Main Address:

8789 Gull Road
Richland, MI 49083
800-974-5870

Delivery Method:

Telephone: 800-974-5870

Financial Strategies Mortgage, Inc.

www.bkcourse.com

Main Address:

695 Pro-Med Lane
Carmel, IN 46032
317-566-0425

Delivery Method:

Internet: www.bkcourse.com

English and Spanish (Translator O

Telephone: 877-252-6877

English and Spanish (Translator O

Garden State Consumer Credit Counseling, Inc.

www.novadeb.com

Main Address:

225 Willowbrook Road
Freehold, NJ 07728
800-772-4557

Delivery Method:

Telephone: 866-254-2660

Granite Lake Educational Resources

www.backtogo.org

Main Address:

111 West Cataldo
Suite 200
Spokane, WA 99201
509-325-2511

Delivery Method:

Internet: www.backtogo.org

English and Spa

Telephone: 866-366-0599

English and Spa

GreenPath, Inc.

www.greenpathbk.com

Main Address:

38505 Country Club Drive, Suite 210
Farmington Hills, MI 48331-3429
800-630-6718

Delivery Method:

Telephone: 800-630-6718

English and Spanish (Translator O

Hananwill Financial Education Services

www.hananwill.

Main Address:

501 N. Allen Street
Robinson, IL 62454
866-544-5557

Delivery Method:

Internet: www.hananwill.com

Telephone: 866-544-5557

Hummingbird Credit Counseling and Education, Inc.

www.hbcc

Main Address:

3737 Glenwood Avenue
Suite 100-106
Raleigh, NC 27612-5515
800-645-4959

Delivery Method:

Internet: www.hbcce.org

English and Spa

InCharge Education Foundation, Inc.

www.personalfinanceeducation.

Main Address:

2101 Park Center Drive
Suite 310
Orlando, FL 32835
866-729-0049

Delivery Method:

Internet: www.personalfinanceeducation.com

English and Spa

Institute for Financial Literacy, Inc.

www.financialli

Main Address:

449 Forest Avenue
Suite 12
Portland, ME 04101
866-662-4932

Delivery Method:

Internet: www.financiallit.org

Telephone: 866-662-4932

Jane Jolley**Main Address:**

713 Preston Place
Grapevine, TX 76051
888-533-3423

Delivery Method:

Telephone: 888-533-3423

Money Management International, Inc.www.moneymanagement.org**Main Address:**

9009 West Loop South, 7th Floor
Houston, TX 77096-1719
877-918-2227

Delivery Method:

Internet: www.moneymanagement.org

Telephone: 866-745-2227

English and Spa

In Person:

Money Management International, Inc.
8 Winter Street
Boston, MA 02108

Pacific Rim Institute for Development & Education, Inc.**BKEdCert.****Main Address:**

6230 Wilshire Blvd.
Suite 1763
Los Angeles, CA 90048
310-740-2777

Delivery Method:

Internet: www.bkedcert.com

Telephone: 310-740-2777

Internet/Telephone: www.bkedcert.com / 310-740-2777

Parkland Collegewww.parkland.edu/bai/workshops/creditsen**Main Address:**

2400 W. Bradley Avenue
Champaign, IL 61821-1899
217-351-2200

Delivery Method:

Internet: www.parkland.edu/bai/workshops/creditseminar

Springboard Nonprofit Consumer Credit Management, Inc.www.bkhelp.org**Main Address:**

4351 Latham Street
Riverside, CA 92501
800-947-3752

Delivery Method:

Internet: www.credit.org

Telephone: 888-425-3453

English and Spa

Stand Sure Information Services, Inc.

www.pfmcourse.com

Main Address:

16 Arnold Park
Rochester, NY 14607
877-750-0851

Delivery Method:

Internet: www.pfmcourse.com

English and Spa

Start Fresh Today Instructional, LLC

www.startfreshtodayinstructional.com

Main Address:

8 South Michigan Avenue
Suite 2900
Chicago, IL 60603
877-525-2313

Delivery Method:

Internet: www.startfreshtodayinstructional.com

English and Spa

The Village Family Service Center

[www.helpwithmoney.com](http://www.helpwithmoney.org)

Main Address:

1201 25th Street South
Fargo, ND 58106-9859
800-450-4019

Delivery Method:

Internet: www.helpwithmoney.org

Telephone: 800-450-4019

Van Education Center

www.adultedschool.com

Main Address:

4801 Riverbend Rd
Suite 203
Boulder, CO 80301
800-455-8348

Delivery Method:

Internet: www.adultedschool.com

Vintures, LLC

www.onlinebankruptcyschool.com

Main Address:

3053 Freeport Blvd.
Suite 244
Sacramento, CA 95818
877-305-3836

Delivery Method:

Internet: www.onlinebankruptcyschool.com

Your Money Matters Institute, L.L.C.

www.yourmoneymattersinstitute.com

Main Address:

503 Hillcrest Lane
Krum, TX 76249
940-594-9051

Delivery Method:

Internet: www.yourmoneymattersinstitute.com

[USTP Home](#) | [Approved Debtor Education Providers](#) | [Notice & Disclaimers](#) | [FOIA](#) | [Privacy Policy](#) | [DOJ Home](#)

The Discharge in Bankruptcy

The bankruptcy discharge varies depending on the type of case a debtor files: chapter 7, 11, 12, or 13. *Bankruptcy Basics* attempts to answer some basic questions about the discharge available to *individual debtors* under all four chapters including:

1. What is a discharge in bankruptcy?
2. When does the discharge occur?
3. How does the debtor get a discharge?
4. Are all the debtor's debts discharged or only some?
5. Does the debtor have a right to a discharge or can creditors object to the discharge?
6. Can the debtor receive a second discharge in a later case?
7. Can the discharge be revoked?
8. May the debtor pay a discharged debt after the bankruptcy case has been concluded?
9. What can the debtor do if a creditor attempts to collect a discharged debt after the case is concluded?
10. May an employer terminate a debtor's employment solely because the person was a debtor or failed to repay a discharged debt?

WHAT IS A DISCHARGE IN

BANKRUPTCY?

A bankruptcy discharge releases the debtor from personal liability for certain specified types of debts. In other words, the debtor is no longer legally required to pay any debts that are discharged. The discharge is a permanent order prohibiting the creditors of the debtor from taking any form of collection action on discharged debts, including legal action and communications with the debtor, such as telephone calls, letters, and personal contacts.

Although a debtor is not personally liable for discharged debts, a valid lien (*i.e.*, a charge upon specific property to secure payment of a debt) that has not been avoided (*i.e.*, made unenforceable) in the bankruptcy case will remain after the bankruptcy case. Therefore, a secured creditor may enforce the lien to recover the property secured by the lien.

WHEN DOES THE DISCHARGE OCCUR?

The timing of the discharge varies, depending on the chapter under which the case is filed. In a chapter 7 (liquidation) case, for example, the court usually grants the discharge promptly on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case for substantial abuse (60 days following the first date set for the 341 meeting). Typically, this occurs about four months after the date the debtor files the petition with the clerk of the bankruptcy court. In individual chapter 11 cases, and in cases under chapter 12 (adjustment of debts of a family farmer or fisherman) and 13 (adjustment of debts of an individual with regular income), the court generally grants the discharge as soon as practicable after the debtor completes all

payments under the plan. Since a chapter 12 or chapter 13 plan may provide for payments to be made over three to five years, the discharge typically occurs about four years after the date of filing. The court may deny an individual debtor's discharge in a chapter 7 or 13 case if the debtor fails to complete "an instructional course concerning financial management." The Bankruptcy Code provides limited exceptions to the "financial management" requirement if the U.S. trustee or bankruptcy administrator determines there are inadequate educational programs available, or if the debtor is disabled or incapacitated or on active military duty in a combat zone.

HOW DOES THE DEBTOR GET A DISCHARGE?

Unless there is litigation involving objections to the discharge, the debtor will usually automatically receive a discharge. The Federal Rules of Bankruptcy Procedure provide for the clerk of the bankruptcy court to mail a copy of the order of discharge to all creditors, the U.S. trustee, the trustee in the case, and the trustee's attorney, if any. The debtor and the debtor's attorney also receive copies of the discharge order. The notice, which is simply a copy of the final order of discharge, is not specific as to those debts determined by the court to be non-dischargeable, *i.e.*, not covered by the discharge. The notice informs creditors generally that the debts owed to them have been discharged and that they should not attempt any further collection. They are cautioned in the notice that continuing collection efforts could subject them to punishment for contempt. Any inadvertent failure on the part of the clerk to send the debtor or any creditor a copy of the discharge order promptly within the time

required by the rules does not affect the validity of the order granting the discharge.

ARE ALL OF THE DEBTOR'S DEBTS DISCHARGED OR ONLY SOME?

Not all debts are discharged. The debts discharged vary under each chapter of the Bankruptcy Code. Section 523(a) of the Code specifically excepts various categories of debts from the discharge granted to individual debtors. Therefore, the debtor must still repay those debts after bankruptcy. Congress has determined that these types of debts are not dischargeable for public policy reasons (based either on the nature of the debt or the fact that the debts were incurred due to improper behavior of the debtor, such as the debtor's drunken driving).

There are 19 categories of debt excepted from discharge under chapters 7, 11, and 12. A more limited list of exceptions applies to cases under chapter 13.

Generally speaking, the exceptions to discharge apply automatically if the language prescribed by section 523(a) applies. The most common types of nondischargeable debts are certain types of tax claims, debts not set forth by the debtor on the lists and schedules the debtor must file with the court, debts for spousal or child support or alimony, debts for willful and malicious injuries to person or property, debts to governmental units for fines and penalties, debts for most government funded or guaranteed educational loans or benefit overpayments, debts for personal injury caused by the debtor's operation of a motor vehicle while intoxicated, debts owed to certain tax-advantaged retirement plans, and debts for

certain condominium or cooperative housing fees.

The types of debts described in sections 523(a)(2), (4) and (6) (obligations affected by fraud or maliciousness) are not automatically excepted from discharge. Creditors must ask the court to determine that these debts are excepted from discharge. In the absence of an affirmative request by the creditor and the granting of the request by the court, the types of debts set out in sections 523(a)(2), (4) and (6) will be discharged.

A slightly broader discharge of debts is available to a debtor in a chapter 13 case than in a chapter 7 case. Debts dischargeable in a chapter 13, but not in chapter 7, include debts for willful and malicious injury to property, debts incurred to pay non-dischargeable tax obligations, and debts arising from property settlements in divorce or separation proceedings. Although a chapter 13 debtor generally receives a discharge only after completing all payments required by the court-approved (*i.e.*, "confirmed") repayment plan, there are some limited circumstances under which the debtor may request the court to grant a "hardship discharge" even though the debtor has failed to complete plan payments. Such a discharge is available only to a debtor whose failure to complete plan payments is due to circumstances beyond the debtor's control. The scope of a chapter 13 "hardship discharge" is similar to that in a chapter 7 case with regard to the types of debts that are excepted from the discharge. A hardship discharge also is available in chapter 12 if the failure to complete plan payments is due to "circumstances for which the debtor should not justly be held accountable."

DOES THE DEBTOR HAVE THE RIGHT TO A DISCHARGE OR CAN CREDITORS OBJECT TO THE DISCHARGE?

In chapter 7 cases, the debtor does not have an absolute right to a discharge. An objection to the debtor's discharge may be filed by a creditor, by the trustee in the case, or by the U.S. trustee. Creditors receive a notice shortly after the case is filed that sets forth much important information, including the deadline for objecting to the discharge. To object to the debtor's discharge, a creditor must file a complaint in the bankruptcy court before the deadline set out in the notice. Filing a complaint starts a lawsuit referred to in bankruptcy as an "adversary proceeding."

The court may deny a chapter 7 discharge for any of the reasons described in section 727(a) of the Bankruptcy Code, including failure to provide requested tax documents; failure to complete a course on personal financial management; transfer or concealment of property with intent to hinder, delay, or defraud creditors; destruction or concealment of books or records; perjury and other fraudulent acts; failure to account for the loss of assets; violation of a court order or an earlier discharge in an earlier case commenced within certain time frames (discussed below) before the date the petition was filed. If the issue of the debtor's right to a discharge goes to trial, the objecting party has the burden of proving all the facts essential to the objection.

In chapter 12 and chapter 13 cases, the debtor is usually entitled to a discharge upon completion of all payments under the plan. As in chapter 7, however, discharge may not occur in chapter 13 if the debtor fails to complete a required course on personal financial management. A debtor is also ineligible for a discharge in chapter 13 if he or she received a prior discharge in another case commenced within time frames discussed the next paragraph. Unlike chapter 7, creditors do not have standing to object to the discharge of a chapter 12 or chapter 13 debtor. Creditors can object to confirmation of the repayment plan, but cannot object to the discharge if the debtor has completed making plan payments.

CAN A DEBTOR RECEIVE A SECOND DISCHARGE IN A LATER CHAPTER 7 CASE?

The court will deny a discharge in a later chapter 7 case if the debtor received a discharge under chapter 7 or chapter 11 in a case filed within eight years before the second petition is filed. The court will also deny a chapter 7 discharge if the debtor previously received a discharge in a chapter 12 or chapter 13 case filed within six years before the date of the filing of the second case unless (1) the debtor paid all "allowed unsecured" claims in the earlier case in full, or (2) the debtor made payments under the plan in the earlier case totaling at least 70 percent of the allowed unsecured claims and the debtor's plan was proposed in good faith and the payments represented the debtor's best effort. A debtor is ineligible for discharge under chapter 13 if he or she received a prior discharge in a chapter 7, 11, or 12 case filed four years before the current case or in a chapter 13 case filed two years before the current case.

CAN THE DISCHARGE BE REVOKED?

The court may revoke a discharge under certain circumstances. For example, a trustee, creditor, or the U.S. trustee may request that the court revoke the debtor's discharge in a chapter 7 case based on allegations that the debtor: obtained the discharge fraudulently; failed to disclose the fact that he or she acquired or became entitled to acquire property that would constitute property of the bankruptcy estate; committed one of several acts of impropriety described in section 727(a)(6) of the Bankruptcy Code; or failed to explain any misstatements discovered in an audit of the case or fails to provide documents or information requested in an audit of the case. Typically, a request to revoke the debtor's discharge must be filed within one year of the discharge or, in some cases, before the date that the case is closed. The court will decide whether such allegations are true and, if so, whether to revoke the discharge.

In a chapter 11, 12 and 13 cases, if confirmation of a plan or the discharge is obtained through fraud, the court can revoke the order of confirmation or discharge.

MAY THE DEBTOR PAY A DISCHARGED DEBT AFTER THE BANKRUPTCY CASE HAS BEEN CONCLUDED?

A debtor who has received a discharge may voluntarily repay any discharged debt. A debtor may repay a discharged debt even though it can no longer be legally enforced. Sometimes a debtor agrees to repay a debt because it is owed to a family member or because it represents an obligation to an individual for whom the debtor's reputation is important, such as a family doctor.

WHAT CAN THE DEBTOR DO IF A CREDITOR ATTEMPTS TO COLLECT A DISCHARGED DEBT AFTER THE CASE IS CONCLUDED?

If a creditor attempts collection efforts on a discharged debt, the debtor can file a motion with the court, reporting the action and asking that the case be reopened to address the matter. The bankruptcy court will often do so to ensure that the discharge is not violated. The discharge constitutes a permanent statutory injunction prohibiting creditors from taking any action, including the filing of a lawsuit, designed to collect a discharged debt. A creditor can be sanctioned by the court for violating the discharge injunction. The normal sanction for violating the discharge injunction is civil contempt, which is often punishable by a fine.

CAN AN EMPLOYER TERMINATE A DEBTOR'S EMPLOYMENT SOLELY BECAUSE THE PERSON WAS A DEBTOR OR FAILED TO PAY A DISCHARGED DEBT?

The law provides express prohibitions against discriminatory treatment of debtors by both governmental units and private employers. A governmental unit or private employer may not discriminate against a person solely because the person was a debtor, was insolvent before or during the case, or has not paid a debt that was discharged in the case. The law prohibits the following forms of governmental discrimination: terminating an employee; discriminating with respect to hiring; or denying, revoking, suspending, or declining to renew a license, franchise, or similar privilege. A private employer may not discriminate with respect to employment if the

discrimination is based solely upon the bankruptcy filing.

B 240 - Reaffirmation Agreement
(10/05))

United States Bankruptcy Court

District of _____

In re _____
Debtor

Case No. _____
Chapter _____

REAFFIRMATION AGREEMENT

[Indicate all documents included in this filing by checking each applicable box.]

- Part A: Disclosures, Instructions, and Notice to Debtor (Pages 1 - 5)
- Part B: Reaffirmation Agreement
- Part C: Certification by Debtor's Attorney
- Part D: Debtor's Statement in Support of Reaffirmation Agreement
- Part E: Motion for Court Approval
- Proposed Order Approving Reaffirmation Agreement

[Check this box if] Creditor is a Credit Union as defined in §19(b)(1)(a)(iv) of the Federal Reserve Act

PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

1. DISCLOSURE STATEMENT

Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:

SUMMARY OF REAFFIRMATION AGREEMENT

This Summary is made pursuant to the requirements of the Bankruptcy Code.

AMOUNT REAFFIRMED

- a. The amount of debt you have agreed to reaffirm: \$ _____
- b. All fees and costs accrued as of the date of this disclosure statement, related to the amount of debt shown in a., above: \$ _____
- c. The total amount you have agreed to reaffirm (Debt and fees and costs) (Add lines a. and b.): \$ _____

Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.

ANNUAL PERCENTAGE RATE

[The annual percentage rate can be disclosed in different ways, depending on the type of debt.]

a. If the debt is an extension of "credit" under an "open end credit plan," as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (I) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(I) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the time of the disclosure statement: _____%.

— And/Or —

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

\$ _____ @ _____%;
\$ _____ @ _____%;
\$ _____ @ _____%.

b. If the debt is an extension of credit other than under than an open end credit plan, the creditor may disclose the annual percentage rate shown in (I) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(I) The Annual Percentage Rate under § 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: _____%.

— And/Or —

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed,

the amount of each balance and the rate applicable to it are:

\$ _____ @ _____ %;
\$ _____ @ _____ %;
\$ _____ @ _____ %.

c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:

The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor's goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

<u>Item or Type of Item</u>	<u>Original Purchase Price or Original Amount of Loan</u>
-----------------------------	---

Optional--At the election of the creditor, a repayment schedule using one or a combination of the following may be provided:

Repayment Schedule:

Your first payment in the amount of \$ _____ is due on _____ (date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.

---Or---

Your payment schedule will be: _____ (number) payments in the amount of \$ _____ each, payable (monthly, annually, weekly, etc.) on the _____ (day) of each _____ (week, month, etc.). unless altered later by mutual agreement in writing.

---Or---

A reasonably specific description of the debtor's repayment obligations to the extent known by the creditor or creditor's representative.

2. INSTRUCTIONS AND NOTICE TO DEBTOR

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).
2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.
3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.
4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.
5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.
6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.
7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Frequently Asked Questions:

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A "lien" is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.

NOTE: When this disclosure refers to what a creditor "may" do, it does not use the word "may" to give the creditor specific permission. The word "may" is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.

PART B: REAFFIRMATION AGREEMENT.

I (we) agree to reaffirm the debts arising under the credit agreement described below.

1. Brief description of credit agreement:

2. Description of any changes to the credit agreement made as part of this reaffirmation agreement:

SIGNATURE(S):

Borrower:

Co-borrower, if also reaffirming these debts:

(Print Name)

(Print Name)

(Signature)

(Signature)

Date: _____

Date: _____

Accepted by creditor:

(Print Name)

(Signature)

Date of creditor acceptance: _____

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY).

[Check each applicable box.]

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

[If applicable and the creditor is not a Credit Union.] A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Printed Name of Debtor's Attorney: _____

Signature of Debtor's Attorney: _____

Date: _____

PART D: DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

[Read and complete numbered paragraphs 1 and 2, OR, if the creditor is a Credit Union and the debtor is represented by an attorney, read the un-numbered paragraph below. Sign the appropriate signature line(s) and date your signature.]

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$_____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$_____, leaving \$_____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____.

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

(Joint Debtor, if any)

Date: _____

— Or

[If the creditor is a Credit Union and the debtor is represented by an attorney]

I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

(Joint Debtor, if any)

Date: _____

PART E: MOTION FOR COURT APPROVAL

(To be completed only if the debtor is not represented by an attorney.)

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement.

Signed: _____
(Debtor)

(Joint Debtor, if any)

Date: _____

United States Bankruptcy Court
District of _____

In re _____
Debtor

Case No. _____
Chapter _____

ORDER APPROVING REAFFIRMATION AGREEMENT

The debtor(s) _____ have filed a motion for approval of the
(Name(s) of debtor(s))
reaffirmation agreement dated _____ made between the debtor(s) and
(Date of agreement)
_____. The court held the hearing required by 11 U.S.C. § 524(d)
(Name of creditor)
on notice to the debtor(s) and the creditor on _____
(Date)

COURT ORDER: The court grants the debtor's motion and approves the reaffirmation agreement described above.

BY THE COURT

Date: _____

United States Bankruptcy Judge